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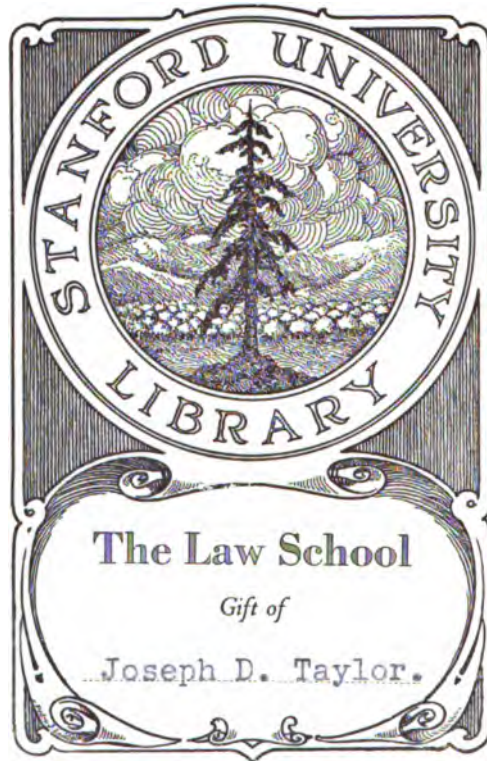
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#82



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SUMMARY OF THE ACT TO REGULATE COMMERCE

(As amended to Jan. 1, 1917)

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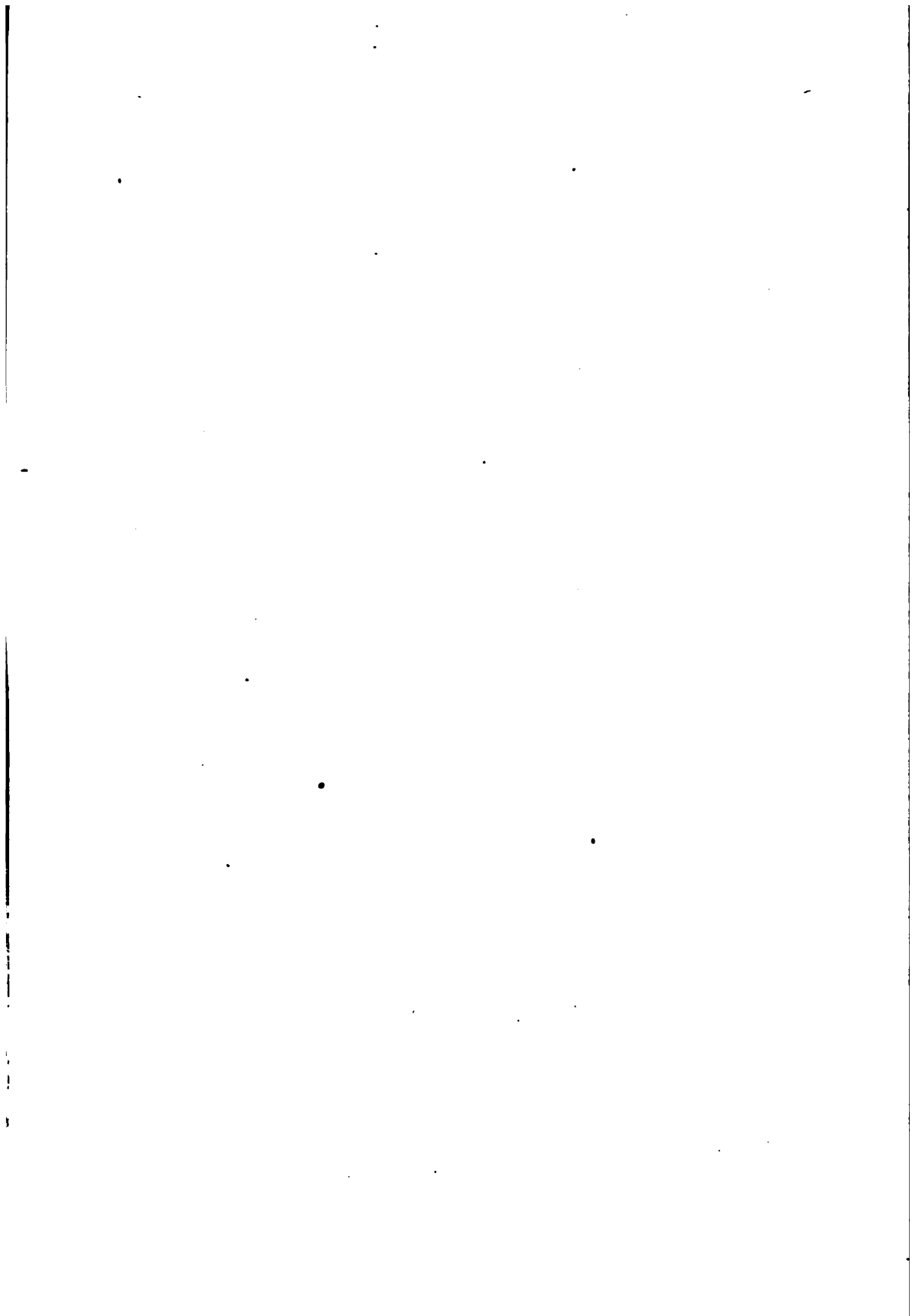
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A
SELECTION OF CASES
UNDER THE
INTERSTATE COMMERCE ACT

EDITED BY
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PROFESSOR OF LAW IN HARVARD UNIVERSITY

In the law we only occasionally can reach an absolutely final and quantitative determination, because the worth of the competing social ends which respectively solicit a judgment for the plaintiff or the defendant cannot be reduced to number and accurately fixed. The worth, that is, the intensity of the competing desires, varies with the various ideals of the time, and, if the desires were constant, we could not get beyond a relative decision that one was greater and one was less. But it is of the essence of improvement that we should be as accurate as we can.

MR. JUSTICE HOLMES.

CAMBRIDGE
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1915

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PREFATORY NOTE

THE original Interstate Commerce Act has now been on the statute books for twenty-eight years. Since then, by successive amendments, the scope of the Act has been greatly extended, both as to the kinds of the utilities affected and as to the extent of the regulation of their business. As a result, the vast and increasing volume of utility enterprise which transcends the confines of a single state, (and even intrastate business which is inseparably connected with or affects interstate commerce), is now governed by a single act and is primarily enforced by a single tribunal. The real scope and meaning of the Act must be sought in a mass of decisions through which there is gradually emerging a body of principles. The intrinsic importance of the subject, the part it plays, and the greater part it is likely to play, in the work of the modern lawyer, calls for the training of men equipped to participate in its enforcement as lawyers, administrators, and judges. In other words, the subject calls for organized, systematic study as one of the most vital branches of the law. Such study is the more imperative now that the Interstate Commerce Act and the experience of its enforcement have, *mutatis mutandis*, served as the basis for the far-reaching regulation of interstate industrial business embodied in the Federal Trade Commission Act of September 26, 1914, as well as for the regulation of state utilities, through the more recent state utility commission statutes. The present selection of cases has been prepared for use in the Harvard Law School.

The generous co-operation of Mr. Max Lowenthal of the New York Bar has made this collection possible at this time.

F. F.

CAMBRIDGE, January, 1915

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A SELECTION OF CASES

UNDER THE

INTERSTATE COMMERCE ACT

The Congress shall have Power

[3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

— And

[18] To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers.

ARTICLE I, SECTION 8, of the Constitution of the United States.

CHAPTER I

SCOPE OF THE COMMERCE REGULATED BY THE ACT

1. KINDS OF "CARRIERS"

OMAHA STREET RAILWAY *v.* INTERSTATE COMMERCE COMMISSION.

230 U. S. 324 (1913).

The facts are stated in the opinion.

Mr. John Lee Webster, with whom *Mr. Frederic D. McKenney* was on the brief, for appellants.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Omaha & Council Bluffs Railway & Bridge Company was chartered as a Street Railroad Company under the laws of Iowa. It owned street car lines in Council Bluffs and, in 1887, was authorized by Congress to construct a bridge across the

Missouri River and to operate thereon "steam, cable and street cars." (March 3, 1887, 24 Stat. 501, c. 356.) The Omaha & Council Bluffs Railway, chartered as a Street Railroad under the laws of Nebraska, owned the street car lines in Omaha and its suburbs, South Omaha, Benson, Dundee and Florence. This street railroad had no right of eminent domain and was not authorized to haul freight, being limited by its charter to carrying passengers only. By lease it acquired the bridge and car lines in Council Bluffs which thereafter it operated as part of its system. Complaint having been made that certain interstate fares were unreasonable, a hearing was had before the Commerce Commission, which, on November 27, 1909 (17 I. C. C. 239), ordered a reduction in the rate between Council Bluffs, Iowa, and points beyond the Loop, in Omaha, Nebraska. The two companies, lessor and lessee, thereupon filed a bill in the United States Circuit Court for the District of Nebraska to enjoin the order. The case was heard before three Circuit Judges, who (179 Fed. Rep. 243) granted a temporary injunction.

The case was transferred to the Commerce Court, which, on October 5, 1911, dismissed the bill, 191 Fed. Rep. 40.

On the argument of the appeal in this court, the sole question discussed was whether the provisions of the Commerce Act as to railroads applied to street railroads, the appellant relying, among other things, on the fact that during the discussion in the Senate the author of the bill and Chairman of the Senate Committee to which it had been referred, said (17 Cong. Rec. Pt. IV, p. 3472) "that the Bill is not intended to affect the stage coach, the *street railway*, the telegraph lines, the canal boat, or the vessel employed in the inland or coasting trade, even though they may be engaged in interstate commerce, because it is not deemed necessary or practicable to cover such a multitude of subjects." After quoting § 1¹ and this statement and construing it in the

¹ SEC. 1. That the provisions of this act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment) from one State or Territory of the United States or the District of Columbia to any other State or Territory or from one place in a Territory

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light of the broad scope of the act, the Commerce Court held that the meaning of the statute could not be determined from statements used in debate. We concur in that view. The act must be interpreted by its own terms, and we must look to it as a whole, in order to determine whether it applies to Street Railroads, carrying passengers between cities divided by a state line.

The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.

But, in 1887, that word had no fixed and accurate meaning, for there was then, as now, a conflict in the decisions of the state courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word "railroad" does not mean "street railroad." The defense cite decisions to the contrary from an equal number of States. The present record discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Willson v. Rock Creek Ry. Co.*, 7 I. C. C. 83.

This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads

to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country. Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of the property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier," as used in this act, shall include express companies and sleeping car companies. The term "railroad," as used in this act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property. (24 Stat. 379.)

and street railroads, there is also a difference. Some courts, emphasizing the similarity, hold that in statutes the word "Railroad" includes Street Railroad, unless the contrary is required by the context. Others, emphasizing the dissimilarity, hold that "Railroad" does not include Street Railroad unless required by the context, since, as tersely put by the Court of Appeals of Kentucky, "a street railroad, in a technical and popular sense, is as different from an ordinary railroad as a street is from a road." *Louisville & Portland R. R. Co. v. Louisville City Ry. Co.*, 2 Duvall, 175.

But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word "Railroad" will include Street Railroad. On the other hand, if the act was aimed at Railroads proper, then Street Railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street Railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight "between States," "between States and Territories," "between the United States and foreign countries." The act referred to Railroads which were required to post their schedules — not at street corners where passengers board street cars, but in "*every depot, station or office where passengers or freight are received for transportation.*" The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and reasonable facilities for interchange of traffic

with connecting lines, so that freight might be easily and expeditiously moved in interstate commerce.

Every provision of the statute is applicable to railroads. Only a few of its requirements are applicable to street railroads which did not do the business Congress had in contemplation and had not engaged in the pooling, rebating and discrimination which the statute was intended to prohibit. This was recognized in *Willson v. Rock Creek Ry. Co.*, 7 I. C. C. 83, where, although it was held that the statute applied to a street railroad between Washington, D. C., and a point in Maryland, the Commission nevertheless said (7 I. C. C. 88): "It may be conceded that this class of railroads was not specifically within the contemplation of the framers of that law, for the evils which it was intended to remedy would, in the nature of the case, but rarely arise in the management of such roads in their dealing with the public."

Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad "subject to the act" being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word "railroad" cannot be construed to include street railroad.

But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. The case was heard on demurrer, with the opinion of the Commission treated as a part of the record. It indicates that at some points the line is on private property, but where this is and to how great an extent does not appear. Indeed, the record does not show that electricity was used as a motive power, though, in the light of modern methods, that may possibly be assumed. But it affirmatively appears that the company was chartered as a street railroad, and hauls no freight and is doing only a business appropriate to a street railroad. So that whatever the motive power or the size or speed of the cars is immaterial. In any event, there were "street cars" referred to in the act of Congress authorizing the construc-

tion of the Bridge from Council Bluffs to Omaha (24 Stat. 501). The company used such cars and did a street passenger business only. It laid its tracks in crowded thoroughfares of those cities and their suburbs and it is manifest that Congress did not intend that these tracks should be connected with Railroads for hauling freight cars and long trains through and along the streets of Omaha and Council Bluffs.

It is contended, however, that the amendment of June 18, 1910, 36 Stat. 539, 553, c. 309, shows that Congress considered that street railroads were under the jurisdiction of the Commission inasmuch as it then provided that "the Commission shall not establish any through route, classification or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character." It is contended on the other hand that in that statute Congress distinctly recognized that a street electric road was "a different character of railroad," and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original Act.

This section of the act of 1910, however, having been passed after the order was made by the Commission, Nov. 27, 1909, is not before us for construction and, manifestly, cannot be given a retrospective operation, though the Government insists that it should be given a prospective operation and in its brief contends that "even if the Commission's order was without lawful authority at the time it was made (Nov. 27, 1909) the amendment of 1910 either ratified it altogether, or, at least, validated it for the future," and, therefore, it was contended "that the judgment should be affirmed, or if not affirmed as rendered, should be modified to set aside the order only in its operation prior to June 18, 1910," on which day the amendment as to electric street passenger cars became effective. *Mattingly v. District of Columbia*, 97 U. S. 687; *Lowrey v. Hawaii*, 206 U. S. 206; *B. & O. R. R. v. I. C. C.*, 221 U. S. 612, are cited to show that Congress might ratify what had not been originally commanded. The first two decisions relate to transactions of a nature entirely different from that here involved; and, in the *Baltimore & Ohio Case*, which was more like this on its facts, the parties pending the suit stipulated that the order should apply only to the future,

(P. 30)

and it was said that the "question of the authority of the Commission at the time the order was made has become a moot one" (621). There was no such stipulation here, and there being nothing to show that Congress attempted an express ratification, and it being open whether the amendment was intended to confer a jurisdiction not previously given, the motion of the Government to make the order of November 27, 1909, effective from June 18, 1910, cannot prevail.

The decree of the Commerce Court is reversed and that of the three Circuit Judges made permanent. *Reversed.*

MR. JUSTICE PITNEY did not hear the argument and took no part in the decision of this case.

THE PIPE LINE CASES¹

234 U. S. 548 (1914).

The facts are stated in the opinion.

The Solicitor General [Davis] for the United States and *Mr. Charles W. Needham* for the Interstate Commerce Commission.

Mr. John G. Milburn, with whom *Mr. Frank L. Crawford*, *Mr. Walter F. Taylor*, *Mr. M. F. Elliott* and *Chester O. Swain* were on the brief, for appellees in Nos. 481, 482 and 483.

Mr. W. S. Fitzpatrick, with whom *Mr. J. B. F. Cates*, *Mr. L. W. Keplinger* and *Mr. C. W. Trickett* were on the brief, for appellee in No. 506.

Mr. Albert L. Wilson for appellee in No. 507.

Mr. W. I. Lewis, *Mr. Archibald F. Jones* and *Mr. R. R. Lewis*, for appellees in No. 508 submitted.

MR. JUSTICE HOLMES delivered the opinion of the court.

By the act of Congress of June 29, 1906, c. 3591, 34 Stat. 584, the Act to Regulate Commerce was amended so that the first section reads in part as follows: "That the provisions of this

¹ Docket title of these cases: No. 481. *United States v. Ohio Oil Company*. No. 482. *United States v. Standard Oil Company*. No. 483. *United States v. Standard Oil Company of Louisiana*. No. 506. *United States v. Prairie Oil & Gas Company*. No. 507. *United States v. Uncle Sam Oil Company*. No. 508. *United States v. Benson*, doing business under the Partnership Name of Tide Water Pipe Company, Limited.

Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity (except water and except natural or artificial gas) by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Thereafter the Interstate Commerce Commission issued an order requiring the appellees among others, being parties in control of pipe lines, to file with the Commission, schedules of their rates and charges for the transportation of oil. 24 I. C. C. 1. The appellees thereupon brought suit in the Commerce Court to set aside and annul the order, and a preliminary injunction was issued by that court, on the broad ground that the statute applies to every pipe line that crosses a state boundary and that thus construed it is unconstitutional. 204 Fed. Rep. 798. The United States, the Interstate Commerce Commission and other intervening respondents appealed.

The circumstances in which the amendment was passed are known to every one. The Standard Oil Company, a New Jersey corporation, owned the stock of the New York Transit Company, a pipe line made a common carrier by the laws of New York, and of the National Transit Company, a Pennsylvania corporation of like character, and by these it connected the Appalachian oil field with its refineries in the east. It owned nearly all the stock of the Ohio Oil Company, which connected the Lima-Indiana field with its system; and the National Transit Company, controlled by it, owned nearly all the stock of the Prairie Oil and Gas Company, which ran from the Mid-Continent field in Oklahoma and Kansas and the Caddo field in Louisiana to Indiana and connected with the previously mentioned lines. It also was largely interested in the Tide Water Pipe Company, Limited, which connected with the Appalachian and other fields and pursued the methods of the Standard Oil Company about to be described. By the before mentioned and subordinate lines the Standard Oil Company had made itself master of the only practicable oil transportation between the oil fields east of California and the Atlantic Ocean and carried much the greater part of the oil between those points. Before the recent dissolution the New York and Pennsylvania Companies had extended their lines into New Jersey and Maryland to the refineries and the laws of those States did not require them to be common carriers. To meet the present amendment the Standard Oil Company took a con-

veyance of the New Jersey and Maryland lines, and the common carrier lines now end at insignificant places where there are neither market nor appliances except those of the Standard Oil, by which it would seem that the whole transport of the carriers' lines is received. There is what seems to be merely a formal breach of continuity when the carriers' pipes stop. The change is not material to our view of the case.

Availing itself of its monopoly of the means of transportation the Standard Oil Company refused through its subordinates to carry any oil unless the same was sold to it or to them and through them to it on terms more or less dictated by itself. In this way it made itself master of the fields without the necessity of owning them and carried across half the continent a great subject of international commerce coming from many owners but, by the duress of which the Standard Oil Company was master, carrying it all as its own. The main question is whether the act does and constitutionally can apply to the several constituents that then had been united into a single line.

Taking up first the construction of the statute, we think it plain that it was intended to reach the combination of pipe lines that we have described. The provisions of the act are to apply to any person engaged in the transportation of oil by means of pipe lines. The words 'who shall be considered and held to be common carriers within the meaning and purpose of this act' obviously are not intended to cut down the generality of the previous declaration to the meaning that only those shall be held common carriers within the act who were common carriers in a technical sense, but an injunction that those in control of pipe lines and engaged in the transportation of oil shall be dealt with as such. If the Standard Oil Company and its coöperating companies were not so engaged no one was. It not only would be a sacrifice of fact to form but would empty the act if the carriage to the seaboard of nearly all the oil east of California were held not to be transportation within its meaning, because by the exercise of their power the carriers imposed as a condition to the carriage a sale to themselves. As applied to them, while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. That is the plain meaning as has been held with regard to other statutes similarly framed. *Atlantic Coast Line R. R. Co. v. River-side Mills*, 219 U. S. 186, 195, 203. Its evident purpose was to bring within its scope pipe lines that although not technically

common carriers yet were carrying all oil offered; if only the offerers would sell at their price.

The only matter requiring much consideration is the constitutionality of the act. That the transportation is commerce among the States we think clear. That conception cannot be made wholly dependent upon technical questions of title, and the fact that the oils transported belonged to the owner of the pipe line is not conclusive against the transportation being such commerce. *Rearick v. Pennsylvania*, 203 U. S. 507, 512. See *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111. The situation that we have described would make it illusory to deny the title of commerce to such transportation, beginning in purchase and ending in sale, for the same reasons that make it transportation within the act.

The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid. So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes. The answer to their objection is not that they may give up the business, but that, as applied to them, the statute practically means no more than they must give up requiring a sale to themselves before carrying the oil that they now receive. The whole case is that the appellees if they carry must do it in a way that they do not like. There is no taking and it does not become necessary to consider how far Congress could subject them to pecuniary loss without compensation in order to accomplish the end in view. *Hoke v. United States*, 227 U. S. 308, 323. *Lottery Case*, 188 U. S. 321, 357.

These considerations seem to us sufficient to dispose of the cases of the Standard Oil Company, the Ohio Oil Company, the Prairie Oil and Gas Company and the Tide Water Pipe Company, Limited. The Standard Oil Company of Louisiana was incorporated since the passage of the amendment, and before the beginning of this suit to break up the monopoly of the New Jersey Standard Oil Company. It buys a large part of its oil from the

Prairie Oil and Gas Company which buys it at the wells in the Mid-Continent field and transfers the title to the Louisiana Company in that State. Its case also is covered by what we have said.

There remains to be considered only the Uncle Sam Oil Company. This company has a refinery in Kansas and oil wells in Oklahoma, with a pipe line connecting the two which it has used for the sole purpose of conducting oil from its own wells to its own refinery. It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, we do not regard it as falling within the description of the act, the transportation being merely an incident to use at the end. In that case the decree will be affirmed. In the others the decree will be reversed.

No. 507, Decree affirmed.

Nos. 481, 482, 483, 506 and 508, Decrees reversed.

THE CHIEF JUSTICE concurring.

Agreeing in every particular with the conclusions of the court and with its reasoning except as to one special subject, my concurrence as to that matter because of its importance is separately stated. The matter to which I refer is the exclusion of the Uncle Sam Oil Company from the operation of the act. The view which leads the court to exclude it is that the company was not engaged in transportation under the statute, a conclusion to which I do not assent. The facts are these: That company owns wells in one State from which it has pipe lines to its refinery in another State, and pumps its own oil through such pipe lines to its refinery and the product of course when reduced at the refinery passes into the markets of consumption. It seems to me that the business thus carried on is transportation in interstate commerce within the statute. But despite this I think the company is not embraced by the statute because it would be impossible to make the statute applicable to it without violating the due process clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation. It is shown beyond question that the company buys no oil and by the methods which have been mentioned simply carries its own product to its own refinery; in other words, it is engaged in a purely private business. Under these conditions

in my opinion there is no power under the Constitution without the exercise of the right of eminent domain to convert without its consent the private business of the company into a public one.

Of course this view has no application to the other companies which the court holds are subject to the act because as pointed out the principal ones were chartered as common carriers and they all either directly or as a necessary result of their association were engaged in buying oil and shipping it through their pipes; in other words, were doing in reality a common carrier business, disguised, it may be, in form, but not changed in substance. Under these conditions I do not see how it would be possible to avoid the conclusion which the court has reached without declaring that the shadow and not the substance was the criterion to be resorted to for the purpose of determining the validity of the exercise of legislative power.

MR. JUSTICE MCKENNA, dissenting.¹

2. KINDS OF COMMERCE

RAILROAD COMMISSION OF LOUISIANA *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

229 U. S. 336 (1913).

The facts are stated in the opinion.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, *Mr. Wylie M. Barrow*, Assistant Attorney General, and *Mr. E. Howard McCaleb* for appellants.

Mr. Charles Payne Fenner, *Mr. Walker B. Spencer*, *Mr. Philip S. Gidiere*, *Mr. Esmonds Phelps*, *Mr. Henry Bernstein*, *Mr. John Totts* and *Mr. F. G. Hudson* for appellees.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Suit in equity to declare void certain orders of the Railroad Commission of the State of Louisiana and to restrain the enforcement of penalties for the alleged violation thereof. The ground of the suit is that the orders and the penalties constitute a regulation of interstate commerce and therefore are in violation of the commerce clause of the Constitution of the United States.

¹ The dissenting opinion is omitted. — Ed.

An amended and supplemental bill was filed by leave of the court, making the appellant, Walter Guion, then Attorney General of the State, a party on the ground that he had asserted a right and intention to bring suits in the state courts to collect the fines and penalties imposed by the State Railroad Commission.

A demurrer was filed to the bill, stating as grounds thereof — (1) That neither the original nor the supplemental bill stated any cause for the relief prayed. (2) That the suit was one against the State, being one brought to restrain the State in her sovereign character and capacity from instituting suits to recover and enforce the collection of penalties imposed under and by virtue of the provisions of her constitution of a penal nature. (3) That the amount involved is not sufficient to give the court jurisdiction, not being over \$2,000.

The demurrer was overruled. An answer was then filed. The case was referred to a master, who reported his conclusions of fact and of law and recommended that the bill be dismissed, basing his recommendation on *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, 204 U. S. 403.

The Circuit Court, however, drew a different conclusion from the facts, and entered a decree perpetually enjoining the fines imposed. The decree was affirmed by the Circuit Court of Appeals, expressing, without discussion, its concurrence with the court below that on the facts found by the master the commerce involved in the case was interstate.

The facts as found by the master may be summarized as follows:

The appellee railroad companies are corporations engaged in interstate and intrastate commerce from points within and without the State of Louisiana to the City of New Orleans, and the freight transported by them is subsequently loaded on board ships and transported to foreign ports and countries. The Railroad Commission of Louisiana, on May 25, 1905, promulgated and put in effect an order which fixed the freight rates that the railroads should be entitled to charge on all intrastate traffic, and the rates were effective and in force at the date of the shipment in controversy. In the months of July, August and September, 1905, certain persons (their names are unimportant) delivered to the St. Louis, Iron Mountain & Southern Railway Company at certain stations on the line of its road, within the State, eighteen carloads of logs and staves. The logs and staves were transported by the railway from said stations and delivered to Alexandria and there delivered to the Texas & Pacific Railway Company, which trans-

ported them to New Orleans, where they were unloaded from the cars, put on board ship and exported to foreign countries.

When the shipments were made, the local tariff filed with and approved by the State Railroad Commission was ten cents per hundred pounds; the local tariff filed with and approved by the Interstate Commerce Commission on such shipments, at that time, was twelve cents per hundred pounds.

The consignees were notified of the arrival of the cars at New Orleans and the Texas & Pacific Railway Company was ordered by them to deliver the freight to certain steamships plying between New Orleans and European ports. The freight was delivered in accordance with the orders and exported from Louisiana. A freight rate of twelve cents per hundred pounds was charged on the shipments and collected by the railway company.

In March, 1905, a shipper delivered to the Kansas City Southern Railway Company at Leesville, Louisiana, on its line of road, three carloads of tank staves, which were loaded in cars of the Texas & Pacific Railway Company to be transported to a named consignee at New Orleans. The rate established by the State Railroad Commission was ten cents per hundred pounds; the interstate rate filed with the Interstate Commerce Commission was fifteen cents per hundred pounds. The staves were hauled to Shreveport, Louisiana, and there delivered to the Texas & Pacific Railway Company, which hauled them to New Orleans. The customary notice of their arrival was given to the consignee and they were directed by him to be delivered to a particular steamship, to which they were delivered, being switched to the lines of two other carriers and transported to Hamburg. The Texas & Pacific Railway Company collected freight charges thereon from the consignee at fifteen cents per hundred pounds. The consignee at the date of the shipment of the freight resided at New Orleans and was engaged in the business of shipping broker in negotiating for cargo space, routes, and attending to shipments for consignors in the United States. The consignees of the eighteen carloads of logs and staves were engaged at New Orleans in the business of exporting staves to foreign countries; the staves they deal in are not treated, manufactured or changed from the original shape in which they are received at New Orleans for export, and 98 % of the shipments by them at New Orleans are exported to foreign countries.

At the time of the shipment the rules of the State Railroad Commission allowed four days' free time for unloading cars at New

Orleans, except where the consignment was for export, then twenty days were allowed. No demurrage was tendered by the shipper or consignee or received by the carrier on account of delays in handling beyond the four days allowed by the rules. Every one of the shipments paid to the carrier three-fourths of a cent per hundred pounds for handling charges, this being the amount paid on all export shipments. The shipments were in the physical custody of the railroad company until arrival at New Orleans and thereafter in the physical custody of the steamships, which issued bills of lading therefor to the shippers of the cargo.

The bills of lading in each instance provided for the delivery of freight from the initial point to New Orleans, there to be delivered to the shipper or consignee's order. But, notwithstanding this, the staves and logs were intended by the shippers to be exported to foreign countries, and were treated by both the shippers and the carriers accordingly, the shippers always holding the cars on the railroad track until they could accumulate cargo to fill their export orders and arrange for transportation. The railroad company allowed the shippers the usual twenty days' time for delivery, as in the case of export shipments, without charging demurrage, which the company would have had the right to charge, after the expiration of four days, if the shipments had been considered and treated as purely intrastate.

The sole question in the case is whether the shipments were foreign or intrastate commerce, or, speaking more accurately, whether they were within Federal or state jurisdiction. The Circuit Court and the Circuit Court of Appeals both decided, as we have seen, that they were within Federal jurisdiction.

Appellants attack the conclusion and rely on, as the master relied on, the case of *Gulf, Colorado & Santa Fe R. R. Co. v. Texas*, *supra*. The argument is that the service rendered by the railroad companies was wholly within the State and had "no contractual or necessary relation to foreign transportation." It was, it is argued, "manifestly preliminary thereto, independently contracted for, and not necessarily connected therewith." And the principle is urged that "locality, therefore, determines the jurisdiction [separation between Federal power and state power] unless it is shown that though the local movement is actually within, it is legally outside the State." To make the movement within legally outside of the State, appellants insist there must be bills of lading and other means of connection between the railroads and the ocean carriers. To make application of this principle, it

is contended that "not a single fact appears or exists, physical or other which connects the railroads with the ocean carrier" and that the intention of the shippers or consignees is made absolutely controlling.

To the principle urged, so far as its applicability to the case at bar is concerned, we may oppose *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; and *Texas & New Orleans R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111.

In those cases there was necessarily a local movement of freight, and it necessarily terminated at the seaboard. But it was decided that its character and continuity as a movement in foreign commerce did not terminate, nor was it affected by being transported on local bills of lading. The principle enunciated in the cases was that it is the essential character of the commerce, not the accident of local or through bills of lading, which determines Federal or state control over it. And it takes character as interstate or foreign commerce when it is actually started in the course of transportation to another State or to a foreign country. The facts of the case at bar bring it within the ruling. The staves and logs were intended by the shippers to be exported to foreign countries, and there was no interruption of their transportation to their destination except what was necessary for transshipment at New Orleans.

Decree affirmed.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY
COMPANY v. STATE OF IOWA.

• 233 U. S. 334 (1914).

The facts are stated in the opinion.

Mr. O. W. Dynes, with whom *Mr. C. S. Jefferson* and *Mr. Burton Hudson* were on the brief, for plaintiff in error.

Mr. George Cosson, Attorney General of the State of Iowa, with whom *Mr. Henry E. Sampson* was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought by the State of Iowa to obtain a mandatory injunction requiring the Chicago, Milwaukee & St. Paul Railway Company to comply with an order of the State Railroad

Commission promulgated December 22, 1909. The defendant answered, denying the validity of the order, and also filed a cross petition to set it aside alleging that it was repugnant to the Constitution of the United States as an attempt to regulate interstate commerce and to deprive the Company of its property without due process of law and, further, that the Commission was without authority under the laws of the State to make the order. Judgment, sustaining the action of the Commission and directing compliance, was affirmed by the Supreme Court of the State. 152 Iowa, 317.

It appeared that the Railway Company, in 1909, had refused to accept shipments of coal in carload lots at Davenport, Iowa, for points in that State when tendered in cars of other railroad companies by which the coal had been brought to Davenport from points in Illinois. The Railway Company insisted that it was entitled to furnish its own cars. The Clark Coal and Coke Company, operating a branch at Davenport, complained of this rule to the Railroad Commission, stating that it was a departure from the practice which had obtained for several years with respect to such shipments, that the Clark Company paid all charges to Davenport and on receiving orders from its customers tendered written billing for transportation from Davenport to the designated points, and that it was unreasonable for the Railway Company to require in such cases that the coal should be unloaded and reloaded in its own cars. A hearing was had before the Commission at which other shippers intervened, adopting the coal company's complaint. The facts were presented in an agreed statement, as follows:

"The Clark Coal & Coke Company of Davenport, Iowa, have been making shipments of coal from points in Illinois to Davenport by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company; that said coal is then placed by the railroad bringing it into Iowa on an interchange track at Davenport; that all charges from point of origin in Illinois to Davenport, Iowa, are paid by the Clark Coal & Coke Company to the railroad company bringing said coal; that thereupon complainant had notified the respondent railway company of the placement of said coal and that it desired to ship said coal by the respondent railway company to different points on its own line, and tendered a written billing from Davenport to the point so designated; that thereupon respondent railway company has accepted said written billing from Davenport to said

point and taken said cars from said interchange track to its own line and transported the same in accordance with said written billing; that the respondent railway company has changed its method of doing business in the above respects by its printed order and now refuses to accept said written billing and take said cars from said interchange track and transport them over its own line to the point designated by said billing, unless said coal is loaded in equipment belonging to respondent railway company. Respondent railway company, by its answer to the complaint, alleges that it 'will furnish cars for shipment of coal from Davenport to any point in Iowa, as provided by Iowa Distance Tariff, but will not accept shipments originating at Davenport, billed from Davenport in the equipment of other carriers,' and its readiness and ability to furnish cars of its own for shipment is not controverted and will therefore be taken to be true. It will thus be observed that before the respondent railway company will take coal for transportation on its own line, in equipment other than its own, it requires that the same shall be unloaded and reloaded into its own cars."

Thereupon, the Commission rendered a decision in favor of the shipper and entered the following order to which this controversy relates:

"In accordance with the conclusions heretofore expressed, it is therefore ordered by the Board of Railroad Commissioners of Iowa that upon arrival of loaded cars of coal at the city of Davenport, upon any line of railroad, when said cars are placed upon the interchange track at Davenport as ordered or requested by the owner or consignee of said cars and the freight paid thereon, and the ordinary billing in use by the respondent railway is tendered to it for a billing of said cars so placed to a point on its own line within the State of Iowa, that the respondent railway company be and it is hereby ordered and required to accept said billing, receive said car or cars so billed and transport them on its own line to the point designated by the owner or consignee in said billing; and that it receive said car or cars in whatever equipment the same may be loaded, without requiring an unloading and reloading into its own equipment, and transport said car or cars over its own line to points within this State, so loaded, without unloading or reloading as above set forth, in the same manner that it receives cars from connecting lines loaded in its own equipment. It is expressly understood, however, in this order, that no questions in relation to switching charges are determined."

The Railway Company contended, both before the Commission and in the state court, that the shipments in question were interstate; and it was alleged in its answer that the method of transportation resorted to was a device of shippers to secure, by adding the rate from the initial point in Illinois to Davenport to the rate established by the Iowa distance tariff from Davenport to other points in the State, a lower rate than that applicable to an interstate shipment from the point in Illinois to the point of final destination.

The Railroad Commission held that the transportation desired from Davenport was a purely intrastate service, saying: "Under the admitted facts, the city of Davenport became a distributing point for coal shipped by the consignor. The certainty in regard to the shipments of coal ended at Davenport. The point where the same was to be shipped beyond Davenport, if at all, was determined after the arrival of the coal at Davenport. The coal was under the control of the consignee and he could sell it in transit or at Davenport or reconsign it to a point on respondent's railway, or any other railway, at his own discretion." Upon the trial of the present suit in the state court, the State introduced in evidence the proceedings, decision and order of the Commission, and without further evidence both parties rested. The Supreme Court of the State took the same view of the facts that the Commission had taken and accordingly held that the shipments were intrastate. The court said that the facts showed that the coal was originally consigned to the coal company in Davenport, that it was there held until sales were made, that the consignee had taken delivery, paying the freight to the initial carrier and assuming full control. 152 Iowa, 317, 319.

The record discloses no ground for assailing this finding. It is undoubtedly true that the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce and not by mere billing or forms of contract. *Ohio Railroad Commission v. Worthington*, 225 U. S. 101; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Railroad Commission of Louisiana v. Texas & Pacific Rwy. Co.*, 229 U. S. 336. But the fact that commodities received on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement or prevent the reshipment to a point within the same State from having an independent and intrastate character. *Gulf, Colorado & Santa Fe Rwy. Co. v.*

Texas, 204 U. S. 403; *Ohio Railroad Commission v. Worthington*, 225 U. S. 101, 109; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111, 129, 130. The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here. In the light of its decision, the order of the Commission must be taken as referring solely to intrastate transportation originating at Davenport. . . .

Affirmed.

THE MINNESOTA RATE CASES.

230 U. S. 352 (1913).¹

These suits were brought in the Circuit Court of the United States for the district of Minnesota by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis and St. Louis Railroad Company to restrain the enforcement of two orders of the Railroad and Warehouse Commission of the State of Minnesota and two acts of the legislature of that State prescribing maximum charges for transportation of freight in that State and a maximum rate of two cents a mile for passengers. The rates related to traffic exclusively between points in the State. It was contended, however, that as applied to cities on the State's boundaries or to places within competitive districts crossed by the state line, the railways disturbed the relation previously existing between interstate and intrastate rates, thus imposing a direct burden on interstate commerce and creating discriminations as against localities in other states. The rates were also assailed as confiscatory. The jurisdiction of the Circuit Court was sustained in *Ex parte Young*, 209 U. S. 123, where it was also held that the penal provisions of the acts, operating to preclude a fair opportunity to test their validity, were unconstitutional on their face. The Circuit Court then referred the suits to a special master, who took the evidence and made an elaborate report sustaining the complainant's contentions. His findings were confirmed by the court and decrees were entered accordingly, adjudging the acts and orders (with the exception, in the case of the Minneapolis and St. Louis Rail-

¹ A brief statement has been framed upon the opinion of the court.—ED.

road Company, of the order of May 3, 1907) to be void and permanently enjoining the enforcement of the prescribed rates, freight and passenger, and their adoption or maintenance by the railroad companies. 184 Fed. Rep. 765.

From these decrees, the Attorney-General of the State and the members of the Railroad and Warehouse Commission prosecute these appeals.

Mr. Thomas D. O'Brien for appellants.

Mr. Edward T. Young, also for the appellants.

Mr. George T. Simpson, attorney general of the State of Minnesota, and *Mr. Lyndon A. Smith* were on the brief, for appellants.

Mr. Clifford Thorne, *Mr. H. T. Clarke, Jr.*, *Mr. Geo. A. Henshaw*, *Mr. John Marshall*, *Mr. Royal C. Johnson*, *Mr. P. W. Dougherty*, *Mr. Grant G. Martin*, *Mr. U. G. Powell*, *Mr. John H. Henderson*, *Mr. Dwight N. Lewis*, *Mr. William D. Williams*, *Mr. W. H. Stutsman* and *Mr. H. R. Oglesby*, by leave of the court, filed a brief as *amici curiæ* on behalf of the Railroad Commissions of Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

Mr. Charles W. Bunn for appellees.

Mr. Pierce Buller, with whom *Mr. Hale Holden*, *Mr. Jared How* and *Mr. William D. Mitchell* were on the brief, also for appellees.

Mr. W. P. Clough filed a brief in behalf of the Northern Pacific Railway Company and the Great Northern Railway Company, appellees.

Mr. Edmund S. Durment, by leave of the court, filed a brief as *amicus curiæ*.

MR. JUSTICE HUGHES delivered the opinion of the court. . . .¹

The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling. A scheme of state rates framed to avoid discrimination between localities within the State, and to provide an harmonious system for intrastate transportation throughout the State, naturally would embrace those places within the State which are on or near the State's

¹ Only so much of the opinion as deals with the effect of the acts and orders on interstate commerce is here reprinted. — Ed.

boundaries; and, when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to points adjacent to, but across, the state line. Kansas City, Kansas, and Kansas City, Missouri; East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines and in every part of the land competitive districts embrace points in different States.

With appreciation of the gravity of the controversy, the Railroad Commissioners of eight States¹ have filed their brief as *amici curiæ*, in support of the appeals, stating that, if the doctrine of the court below were accepted, the regulation by the States of rates for intrastate transportation would be practically destroyed. They say that "there is practically no movement of traffic between two towns within a State that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." The Governors of three States, pursuant to a resolution of a conference of the Governors of all the States, have also presented, by leave of the court, their argument in defense of the position taken by Minnesota. They do not seek "to belittle the effect of the action of Minnesota on the business between the places" named in the findings, but they are convinced that if the principle announced by the Circuit Court is upheld, it can be made to apply by a showing of similar facts in virtually every State. Insisting that, under their reserved power, "the right of the States to regulate their own commerce is as clear and broad as that of Congress to regulate interstate commerce," they assail the decision below, not upon the ground that it incorrectly sets forth conditions in Minnesota and adjoining States, but for what they consider to be "its plain disregard of the provisions of the Federal Constitution, which establish the relations between the Nation and the States." "The operation of these provisions," they

¹ Nebraska, Iowa, Kansas, South Dakota, North Dakota, Oklahoma, Missouri and Texas.

maintain, "was not made to depend on geography or convenience or competition. They cannot apply in one State and not in another, according to circumstances as they may be found by the courts, because they are vital principles which constitute the very structure of our dual form of government."

The controversy thus arises from opposing conceptions of the fundamental law, and of the scope and effect of Federal legislation, rather than from differences with respect to the salient facts.

For the purpose of the present inquiry, the rates fixed by the State must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be taken to be rates which the State, in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the state rates are not of this character — a question to be dealt with later — they cannot be sustained in any event; but, assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds: (1) That the action of the State imposes a direct burden upon interstate commerce; and (2) that it is in conflict with the provisions of the Act to Regulate Commerce.

These grounds are distinct. If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the State has directly restrained that which in the absence of Federal regulation should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the State, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the passage of the Act to Regulate Commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that act, as it stood until the amendment of June 29, 1906, 34 Stat. 584, c. 3591, the Interstate Commerce Commission had no power to prescribe interstate rates. *Interstate Commerce Commission v. C., N. O. & T. P. Ry. Co.*, 167 U. S. 479, 511. The States, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation

that the State could not fix intrastate rates, reasonable as such, generally throughout the State, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected? That is, was the State debarred from fixing reasonable rates on traffic, wholly internal, as to all state points so situated that as a practical consequence the carriers would have to reduce the rates they had made to competing points without the State, in order to maintain the volume of their interstate business or to continue the parity of rates or the relation between rates as it had previously existed? Was the State, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the state power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise it must be determined whether Congress has so acted as to create such a restriction upon the state authority theretofore existing.

(1) The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several States is supreme and plenary. It is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. The conviction of its necessity sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. The words "among the several States" distinguish between the commerce which concerns more States than one and that commerce which is confined within one State and does not affect other States. "The genius and character of the whole government," said Chief Justice Marshall, "seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the

purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." (*Id.*, p. 195.) This reservation to the States manifestly is only of that authority which is consistent with and not opposed to the grant to Congress. There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. *McCulloch v. Maryland*, 4 Wheat. 316, 405, 426; *The Daniel Ball*, 10 Wall. 557, 565; *Smith v. Alabama*, 124 U. S. 465, 473; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618, 619; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Mondou v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, 47, 54, 55.

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the States with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Ex parte McNiel*, 13 Wall. 236, 240; *Welton v. Missouri*, 91 U. S. 275, 280; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Bowman*

v. *Chicago &c. Railway Co.*, 125 U. S. 465, 481, 485; *Gulf, Colorado & Santa Fe Ry. Co. v. Hefley*, 158 U. S. 98, 103, 104; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370, 378; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 436.

The principle, which determines this classification, underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it (*State Freight Tax Case*, 15 Wall. 232; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Philadelphia & Southern Mail S. S. Co. v. Pennsylvania*, 122 U. S. 325; *Leloup v. Mobile*, 127 U. S. 640; *McCall v. California*, 136 U. S. 104; *Brennan v. Titusville*, 153 U. S. 289; *Galveston, Harrisburg & San Antonio Railway Co. v. Texas*, 210 U. S. 217; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 1, 56; *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298; *Crenshaw v. Arkansas*, 227 U. S. 389); or upon persons or property in transit in interstate commerce (*Passenger Cases*, 7 How. 283; *Crandall v. Nevada*, 6 Wall. 35; *State Freight Tax Case*, *supra*, p. 281; *Coe v. Errol*, 116 U. S. 517; *Kelley v. Rhoads*, 188 U. S. 1; *Bacon v. Illinois*, 227 U. S. 504).

They have no power to prohibit interstate trade in legitimate articles of commerce (*Bowman v. Chicago &c. Railway Co.*, *supra*; *Leisy v. Hardin*, 135 U. S. 100; *Vance v. Vandercook Co.* (No. 1), 170 U. S. 438; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229; *L. & N. R. Co. v. Cook Brewing Co.*, 223 U. S. 70); or to discriminate against the products of other States (*Ward v. Maryland*, 12 Wall. 418; *Welton v. Missouri*, *supra*; *Hannibal & St. J. R. R. Co. v. Husen*, 95 U. S. 465; *Guy v. Baltimore*, 100 U. S. 434; *Walling v. Michigan*, 116 U. S. 446; *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Darnell v. Memphis*, 208 U. S. 113); or to exclude from the limits of the State corporations or others engaged in interstate commerce or to fetter by conditions their right to carry it on (*Crutcher v. Kentucky*, 141 U. S. 47; *Western Union Telegraph Co. v. Kansas*, *supra*; *Pullman Co. v. Kansas*,

supra; *International Text Book Co. v. Pigg*, 217 U. S. 91; *Buck Stove Co. v. Vickers*, 226 U. S. 205); or to prescribe the rates to be charged for transportation from one State to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (*Wabash &c. Railway Co. v. Illinois*, 118 U. S. 557, 577; *Covington &c. Bridge Co. v. Kentucky*, 154 U. S. 204; *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27; *Hanley v. Kansas City Southern Ry. Co.*, 187 U. S. 617; *R. R. Commission of Ohio v. Worthington*, 225 U. S. 101; *Texas & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S. 111; *Hall v. DeCuir*, 95 U. S. 485, 488; *Cleveland, C., C. & St. L. Railway Co. v. Illinois*, 177 U. S. 514; *Houston & T. C. R. R. Co. v. Mayes*, 210 U. S. 321; *McNeill v. Southern Railway Co.*, 202 U. S. 543; *Mississippi R. R. Commission v. Illinois Cent. R. R. Co.*, 203 U. S. 335; *Atlantic Coast Line v. Wharton*, 207 U. S. 328; *St. Louis Southwestern Ry. Co. v. Arkansas*, 217 U. S. 136; *Herndon v. C., R. I. & Pac. R. R. Co.*, 218 U. S. 135; *Yazoo &c. R. R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1).

But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the States should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the National authority as

conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible.

The leading illustrations may be noted. Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the local necessities of navigation. Act of August 7, 1789, c. 9, §4; 1 Stat. 53, 54; *Cooley v. Board of Wardens*, *supra*. It was sixty years before provision for Federal license of pilots was made (act of August 30, 1852, c. 106; 10 Stat. 61), and even then port pilots were not included. *Pacific Mail Steamship Co. v. Joliffe*, 2 Wall. 450, 459. And while Congress has full power over the subject and to a certain extent has prescribed rules, it is still in a large measure subject to the regulation of the States. *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187.

A State is entitled to protect its coasts, to improve its harbors, bays and streams, and to construct dams and bridges across navigable rivers within its limits, unless there is conflict with some act of Congress. Plainly, in the case of dams and bridges, interference with the accustomed right of navigation may result. But this exercise of the important power to provide local improvements has not been regarded as constituting such a direct burden upon intercourse or interchange of traffic as to be repugnant to the Federal authority in its dormant state. *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *County of Mobile v. Kimball*, *supra*; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American Bridge Co.*, 113 U. S. 205; *Huse v. Glover*, 119 U. S. 543, 547; *Willamette Bridge Co. v. Hatch*, 125 U. S. 1; *Lake Shore & Michigan C. Ry. Co. v. Ohio*, 165 U. S. 365; *Cummings v.*

Chicago, 188 U. S. 410; *Manigault v. Springs*, 199 U. S. 473. Thus, in *Gilman v. Philadelphia*, *supra*, the complainants were the owners of a valuable wharf and dock property in the Schuylkill River and sought to prevent the construction of a bridge which had been authorized by the legislature of Pennsylvania to connect East and West Philadelphia. It appeared that the bridge would prevent the passage of vessels having masts which had formerly navigated the river up to the complainants' wharf, and would largely reduce the income from the property. The court affirmed the dismissal of the bill upon the ground that in the absence of legislation by Congress the State was acting within its authority. "The States have always exercised this power," said the court (*id.*, p. 729), "and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the Nation." Again, in *Escanaba Co. v. Chicago* *supra*, the question related to the power of the City of Chicago, acting under the authority of the State, to regulate the closing of draws in the bridges over the Chicago River. The court said: "The Chicago River and its branches must . . . be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation, whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. . . . When its (the State's) power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. . . . But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (*Id.*, p. 683.)

While the State may not impose a duty on tonnage (*Steamship Co. v. Portwardens*, 6 Wall. 31; *State Tonnage Tax Cases*, 12 Wall. 204, 212; *Cannon v. New Orleans*, 12 Wall. 577), it may regulate wharfage charges and exact tolls for the use of artificial facilities provided under its authority. The subject is one under state control, where Congress has not acted, although the pay-

ment is required of those engaged in interstate or foreign commerce. *Keokuk Packet Co. v. Keokuk*, 95 U. S. 80; *Cincinnati &c. Packet Co. v. Catlettsburg*, 105 U. S. 559; *Parkersburg & O. R. Transportation Co. v. Parkersburg*, 107 U. S. 691; *Huse v. Glover*, *supra*; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444; *Sands v. Manistee River Improvement Co.*, 123 U. S. 288, 295. In *Transportation Co. v. Parkersburg*, *supra*, the court had before it an ordinance of that city prescribing rates of wharfage on vessels discharging or receiving freight at public landings belonging to the city. A transportation company having steamers plying between Pittsburg and Cincinnati complained that the wharfage charge was exorbitant. The court held that the reasonableness of the charge, it being simply one for wharfage, was to be determined by the state law. "The regulation of wharves belongs *prima facie*, and in the first instance, to the States, and would only be assumed by Congress when its exercise by the States is incompatible with the interests of commerce." (*Id.*, p. 703.) Again, in *Ouachita Packet Co. v. Aiken*, *supra*, where the owners of steamboats engaged in interstate commerce on the Mississippi River complained of wharfage rates at New Orleans as unreasonable and excessive, and in effect "a direct duty, or burden, upon commerce," the court, overruling the contention, held that the case was "clearly within the principles of the former decisions of this court, which affirm the right of a State, in the absence of regulation by Congress, to establish, manage and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce." (*Id.*, p. 447.)

Quarantine regulations are essential measures of protection which the States are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the States and has repeatedly acquiesced in the enforcement of state laws. (Acts of February 25, 1799, c. XII, 1 Stat. 619, R. S., §4797; Act of April 29, 1878, c. 66, 20 Stat. 37; Act of February 15, 1893, c. 114, 27 Stat. 449.) Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (*Hannibal & St. J. Railroad Co. v. Husen*, 95 U. S. 465, 472, 473); but the power of the State to take steps to prevent the introduction or

spread of disease, although interstate and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. *Morgan's &c. S. S. Co. v. Louisiana*, 118 U. S. 455; *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U. S. 613; *Louisiana v. Texas*, 176 U. S. 1; *Rasmussen v. Idaho*, 181 U. S. 198; *Compagnie Francaise &c. v. Board of Health*, 186 U. S. 380; *Reid v. Colorado*, 187 U. S. 137, 138; *Asbell v. Kansas*, 209 U. S. 251. In *Compagnie Francaise &c. v. Board of Health*, *supra*, the court had before it the quarantine law of Louisiana which, among other things, provided the State Board of Health might "in its discretion, prohibit the introduction into any infected portions of the State, persons acclimated, or unacclimated or said to be immune, when in its judgment the introduction of such persons would add to or increase the prevalence of the disease." The Supreme Court of the State, interpreting the statute, held that it empowered the Board to exclude healthy persons from a locality infested with contagious or infectious disease, whether they came from without or within the State. It was objected that this provision was too broad and that the former decisions of the court were based upon the right of the States to exclude diseased persons and things which were not legitimate subjects of commerce. The court sustained the law, saying, with respect to this argument: "But it must be at once observed that this erroneously states the doctrine as concluded by the decisions of this court previously referred to, since the proposition ignores the fact that those cases expressly and unequivocally hold that the health and quarantine laws of the several States are not repugnant to the Constitution of the United States, although they affect foreign and domestic commerce, as in many cases they necessarily must do in order to be efficacious, because until Congress has acted under the authority conferred upon it by the Constitution, such state health and quarantine laws producing such effect on legitimate interstate commerce are not in conflict with the Constitution. True is it that, in some of the cases relied on in the argument, it was held that a state law absolutely prohibiting the introduction, under all circumstances, of objects actually affected with disease, was valid because such objects were not legitimate commerce. But this implies no limitation on the power to regulate by health laws the subjects of legitimate commerce. In other words, the power exists until Congress has acted, to incidentally regulate by health and quarantine laws, even although interstate and foreign com-

merce is affected, and the power to absolutely prohibit additionally obtains where the thing prohibited is not commerce, and hence not embraced in either interstate or foreign commerce." (*Id.*, p. 391.)

State inspection laws and statutes designed to safeguard the inhabitants of a State from fraud and imposition are valid when reasonable in their requirements and not in conflict with Federal rules, although they may affect interstate commerce in their relation to articles prepared for export or by including incidentally those brought into the State and held for sale in the original imported packages. *Gibbons v. Ogden*, *supra*, p. 203; *Turner v. Maryland*, 107 U. S. 38; *Plumley v. Massachusetts*, 155 U. S. 461; *Patapsco Guana Co. v. North Carolina*, 171 U. S. 345, 357, 358; *Savage v. Jones*, 225 U. S. 501. And for the protection of its game and the preservation of a valuable food supply, the State may penalize the possession of game during the closed season whether obtained within the State or brought from abroad. *Silz v. Hesterberg*, 211 U. S. 31.

Interstate carriers, in the absence of Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. *Chicago, Milwaukee & Ry. Co. v. Solan*, 169 U. S. 133, 137; *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 491; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 613. Until the enactment by Congress of the act of April 22, 1908, c. 149, 35 Stat. 65, the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employes while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon. In some States the so-called fellow-servant rule obtained; in others, it had been abrogated; and it remained for Congress, in this respect and in other matters specified in the statute, to establish a uniform rule. *Mondou v. N. Y., N. H. & H. R. R. Co.*, *supra*; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67. So, where Congress has not intervened, state statutes providing damages for wrongful death may be enforced not only against land carriers but also against the owners of vessels engaged in interstate commerce where the wrong occurs within the jurisdiction of the State. *Sherlock v. Alling*, 93 U. S. 99, 103. See *American Steamboat Co. v. Chase*, 16 Wall. 522; *The Hamilton*, 207 U. S. 398. And, until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate

shipments, was subject to state regulation. Some States allowed an exemption by contract from all or a part of the common law liability; others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each State exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the recent amendment of § 20 of the Act to Regulate Commerce. Act of June 29, 1906, c. 3591, 34 Stat. 584; *Adams Express Co. v. Croninger*, 226 U. S. 491, 500. It is within the competency of a State to create and enforce liens upon vessels for supplies furnished under contracts not maritime in their nature, and it is no valid objection that the state law may obstruct the prosecution of a voyage of an interstate character. *The Winnebago*, 205 U. S. 354. It may also create liens for damages to property on land occasioned by negligence of vessels. *Johnson v. Chicago &c. Elevator Co.*, 119 U. S. 388; *Martin v. West*, 222 U. S. 191. Cars employed in interstate commerce may be seized by attachment under state law, in order to compel the payment of debts. *Davis v. C., C., C. & St. L. Ry. Co.*, 217 U. S. 157. And the legislation of the States, safeguarding life and property and promoting comfort and convenience within its jurisdiction, may extend incidentally to the operations of the carrier in the conduct of interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. *Smith v. Alabama*, 124 U. S. 465; *Hennington v. Georgia*, 163 U. S. 299; *N. Y., N. H. & H. R. R. Co. v. New York*, 165 U. S. 628; *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285; *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612; *Missouri Pacific Ry. Co. v. Kansas*, 216 U. S. 262. It has also been held that the State has the power to forbid the consolidation of state railroad corporations with competing lines although both may be interstate carriers and the prohibition may have a far-reaching effect upon interstate commerce. *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 677; *Louisville & Nashville R. R. Co. v. Kentucky*, 161 U. S. 677, 701, 702. See *Northern Securities Co. v. United States*, 193 U. S. 197, 317, 348, 382.

Again, it is manifest that when the legislation of the State is limited to internal commerce to such degree that it does not include even incidentally the subjects of interstate commerce, it is not rendered invalid because it may affect the latter commerce

indirectly. In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State. It was an objection of this sort that was urged and overruled in *Kidd v. Pearson*, 128 U. S. 1, to the law of Iowa prohibiting the manufacture and sale of liquor within the State, save for limited purposes. See also *Geer v. Connecticut*, 161 U. S. 519, 534; *Austin v. Tennessee*, 179 U. S. 343; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245; *Missouri Pacific Ry. Co. v. Kansas*, *supra*. When, however, the State in dealing with its internal commerce undertakes to regulate instrumentalities which are also used in interstate commerce, its action is necessarily subject to the exercise by Congress of its authority to control such instrumentalities so far as may be necessary for the purpose of enabling it to discharge its constitutional function. *Southern Railway Co. v. United States*, *supra*; *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, *supra*.

Within the state power, then, in the words of Chief Justice Marshall is, "that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass. No direct general power over these objects is granted to Congress: and, consequently, they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." *Gibbons v. Ogden*, *supra*, pp. 203, 304.

And, wherever as to such matters, under these established principles, Congress may be entitled to act, by virtue of its power

to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority.

(2) These principles apply to the authority of the State to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the States and from the outset, in many charters, maximum rates for freight or passengers, or both were prescribed.¹ Frequently — and this became the more general practice — the board of directors was permitted to fix charges in its discretion, an authority which in numerous instances was made subject to a limitation upon the amount of net earnings.² In several States maximum rates were also established, or the power to alter rates was expressly reserved, by general laws.³ In 1853, the State of New York fixed the maximum fare for way passengers on the railroads forming the line of New York Central at two cents a mile (Laws of 1853, c. 76, § 7) and this rate extending to Buffalo and Suspension Bridge, on the boundary of the State, has continued to the present day (Cons. Laws, N. Y., 1910, c. 49, § 57). As a rule the restrictions imposed by the early legislation were far from onerous, but they are significant in the assertion of the right of control. More potent than these provisions, in the actual effect upon railroads tariffs, was the state canal. It is a matter of common knowledge that the traffic on the trunk lines from the Atlantic seaboard to the west was developed in competition with the Erie Canal, built, maintained and regulated by the State of New York to promote its commerce.

¹ E. g. Maryland, Laws of 1826, c. CXXIII, § 18; 1830, c. 117, §§ 2, 3; 1834, c. 281, § 3; Massachusetts, Laws of 1829, c. XXVI, § 6; 1830, c. XCIII, § 10; New York, Laws of 1828, c. 21, § 11; c. 238, § 11; 1831, c. 83, § 10; 1836, c. 242, § 9; Virginia, Laws of 1830-1831, c. CXIX, § 19; c. CXXI, § 18; 1835-1836, c. 121, § 24; Ohio, Laws of 1833-1834, p. 203, § 19; p. 396, § 9; North Carolina, Laws of 1836-1837, c. XL, § 30.

² Connecticut, 1832, II Resolves and Private Laws (1789-1836), p. 992; Indiana, Laws of 1832, c. CXLVI, §§ 23, 24; Florida, Laws of 1848, c. 244, § 11; New York, Laws of 1828, c. 304, § 13; 1832, c. 162, §§ 12, 17; Massachusetts, Laws of 1833, c. CXVIII, § 4; Virginia, Laws of 1839, c. 110, § 6; Wisconsin, Laws of 1847, p. 72, § 15; 1851, c. 262, § 7.

³ Illinois, Laws of 1849, p. 15, §§ 21, 32; Massachusetts, Laws of 1845, c. 191, § 2; 1860, c. 201, § 2; New York, Laws of 1850, c. 140, § 33; California, Laws of 1850, c. 128, § 77; 1861, c. CXXXII, § 51; Iowa, Code of 1873, § 1305; Laws of 1874, c. 68, §§ 1-5; Report of Industrial Commission, 1901, Vol. IX, pp. 903-905, 911-915.

The authority of the State to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the State. This was decided in *Chicago, Burlington & Quincy R. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164; *Winona & St. Peter R. R. Co. v. Blake*, 94 U. S. 180, and other cases, following *Munn v. Illinois*, 94 U. S. 113. The question was presented by acts of the legislatures of Illinois, Iowa, Wisconsin and Minnesota, passed in the years 1871 and 1874 in response to a general movement for a reduction of rates. The section of the country in which the demand arose was to a large degree homogeneous and one in which the flow of commerce was only slightly concerned with state lines. But resort was had to the States for relief. In the *Munn Case*, the court had before it the statute of Illinois governing the grain warehouses in Chicago. Through these elevators, located with the river harbor on the one side and the railway tracks on the other, it was necessary according to the course of trade for the product of seven or eight States of the West to pass on its way to the States on the Atlantic coast. In addition to the denial of any legislative authority to limit charges it was urged that the act was repugnant to the exclusive power of Congress to regulate interstate commerce. The court answered that the business was carried on exclusively within the limits of the State of Illinois, that its regulation was a thing of domestic concern and that "certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." In the decision of the railroad cases, above cited, the same opinion was expressed. The language of the court, however, went further than to sustain the state law with respect to rates for purely intrastate carriage. Thus, the act of Wisconsin covered traffic which started within the State and was destined to points outside, and this was treated as being within the state power (*Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164, 177, 178), a view which was later repudiated. *Wabash, St. L. & P. Railway Co. v. Illinois*, 118 U. S. 557.

It became a frequent practice for the States to create commissions, as agencies of state supervision and regulation, and in

many instances the rate-making power was conferred upon these bodies. A summary of such legislation is given in *Interstate Commerce Commission v. Chicago, N. O. & T. P. Ry. Co.*, 167 U. S. 479, 495, 496. One of these state laws, that of Mississippi, passed in 1884, came under review in *Stone v. Farmers Loan & Trust Co.*, 116 U. S. 307. The suit was brought to enjoin the Railroad Commission from enforcing the statute against the Mobile and Ohio Railroad Company. It had been incorporated in the States of Alabama, Mississippi, Tennessee and Kentucky, for the purpose of constructing a railroad from Mobile to some point near the mouth of the Ohio River where it would connect with another railroad, thus forming a continuous line of interstate communication between the Gulf of Mexico and the Great Lakes. The Commission as yet had not acted. Sustaining the state power to fix rates upon traffic wholly internal, the court directed the dismissal of the bill. The State, said the court, (p. 334) "may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." In the same case, it was declared that the power of regulation was not a power to confiscate; and that under pretense of regulating fares and freights, the States could not "require a railroad corporation to carry persons or property without reward," or do that which in law amounted "to a taking of private property for public use without just compensation, or without due process of law." (*Id.*, p. 331.)

In *Wabash, St. L. & P. Railway Co. v. Illinois*, *supra*, it was finally determined that the authority of the State did not extend to the regulation of charges for interstate transportation. There the state statute was aimed at discrimination. It was said to have been violated by the railroad company in the case of shipments from points within Illinois to the city of New York. The state court had construed the statute to be binding as to that part of the interstate haul which was within the State although inoperative beyond the boundary. So applied, this court held the act to be invalid.

But no doubt was entertained of the State's authority to regulate rates for transportation that was wholly intrastate. And, in illustrating the extent of state power (*id.*, p. 564), the court selected transportation across the State from Cairo to Chicago and from Chicago to Alton, all boundary points constituting

important centers of commerce — the one on Lake Michigan, and the others at the confluence of the Mississippi and Ohio rivers, and of the Mississippi and Missouri rivers, respectively. After reviewing decisions holding state laws to be ineffective which imposed a direct burden upon interstate commerce, including the cases of the *State Freight Tax*, 15 Wall. 232; *Hall v. DeCuir*, 95 U. S. 485; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34, the court emphasized the distinction with respect to the operation of the statute upon domestic transactions saying: "Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the state legislature to determine that question." (*Id.*, p. 577.)

The doctrine was thus fully established that the State could not prescribe interstate rates but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the States and its invariable recognition by this court. It has never been doubted that the State could, if it saw fit, build its own highways, canals and railroads. (*Railroad Company v. Maryland*, 21 Wall. 456, 470, 471.) It could build railroads traversing the entire State and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide sphere of influence; but such action of the State would not for that reason be regarded as creating a direct restraint upon interstate commerce and as thus transcending the state power. Similarly, the authority of the State to prescribe what shall be reasonable charges of common carriers for intrastate transportation, unless it be limited by the exertion of the constitutional power of Congress, is state-wide. As a power appropriate to the territorial jurisdiction of the State, it is not confined to a part of the State, but extends throughout the State — to its cities adjacent to its boundaries as well as to those in the interior of the State. To say that this power exists, but that it may be exercised

only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border, is foreign to our jurisprudence.

If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power, that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province.

(3) When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. 379, c. 104), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation in which the nature and extent of state legislation, including the commission plan, were fully reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st session). And it was the fact that beyond the bounds of state control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the first section of the Act to Regulate Commerce there was inserted the following proviso:

"Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

When in the year 1906 (act of June 29, 1906, c. 3591, 34 Stat. 584), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section one was reenacted. Again, in 1910, when the act was extended to embrace telegraph, telephone and cable companies engaged in interstate business, the proviso was once more reenacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. Act of June 18, 1910, c. 309, 36 Stat. 539, 545. The proviso in its present form reads:

"Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

There was thus excluded from the provisions of the act that transportation which was "wholly within one State," with the specified qualification where its subject was going to or coming from a foreign country.

It is urged, however, that the words of the proviso are susceptible of a construction which would permit the provisions of section three of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created

for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative questions which the statute has primarily confided to it. *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. Baltimore & Ohio R. R. Co.*, 222 U. S. 506; *United States v. Pacific & Arctic Co.*, 228 U. S. 87. In the present case, there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review.

The question we have now before us, essentially, is whether after the passage of the Interstate Commerce Act, and its amendment, the State continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court recognizing and upholding this authority, we find no foundation for the proposition that the Act to Regulate Commerce contemplated interference therewith.

Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject. *Missouri Pacific Ry. Co. v. Larabee Mills*, 211 U. S. 612, 620, 621.

How clear was the purpose not to occupy the field thus left to the exercise of state power is shown by the clause uniformly inserted in the numerous acts passed by Congress to authorize the construction of railways across the Indian Territory. This clause, while fixing a maximum passenger rate, made the laws of an adjoining State (in some cases Arkansas, in others Texas, and in others Kansas) applicable to the freight rates to be charged within the Territory; and while the right to regulate rates on the authorized line of railroad was reserved to Congress until a state government should be established, it was expressly provided that, when established, the State should be entitled to fix rates for intrastate transportation — the right remaining with Congress to prescribe rates for such transportation as should be interstate. Within a month after the Act to Regulate Commerce was enacted, two acts were passed by Congress for this purpose with respect to railways extending across the Territory from the Texas to the Kansas boundary. The provision — in both cases in identical language — save that the one referred to the laws of Texas and the other to the laws of Kansas — was as follows (act of Feb. 24, 1887, c. 254, § 4, 24 Stat. 420; act of March 2, 1887, c. 319, § 4, *id.*, 447):

“SEC. 4. That said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Texas for services or transportation of the same kind: *Provided*, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway, and messages on said telegraph and telephone lines, *until a State government or governments shall exist in said Territory within the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway*; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State: *Provided, however*, That the rate of such transportation of passengers, local or inter-State, shall not exceed the rate above expressed: *And provided further*, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.”

The same provision is found in similar statutes passed in almost every year from 1884 to 1902 and relating to lines intended to serve as highways of interstate communication.¹ When Oklahoma became a State, the laws of other States which were referred to in these various acts ceased to be operative within its limits, and by virtue of its Statehood and with the direct sanction of Congress, it became authorized to prescribe reasonable maximum rates for intrastate transportation throughout its extent. *Oklahoma v. A., T. & S. F. Ry. Co.*, 220 U. S. 277, 285; *Oklahoma v. C., R. I. & Pac. Ry. Co.*, 220 U. S. 302, 306.

The decisions of this court since the passage of the Act to Regulate Commerce have uniformly recognized that it was competent for the State to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of state-wide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority. And the decisions recognizing and defining the state power wholly refute the contention that the making of such rates either constitutes a direct burden upon interstate commerce or is repugnant to the Federal statute.

¹ Referring to Laws of Texas: Acts of July 4, 1884, c. 177, § 4, 23 Stat. 69, 70; July 1, 1886, c. 601, § 4, 24 Stat. 117, 119; Feb. 18, 1888, c. 13, § 4, 25 Stat. 35, 37; May 14, 1888, c. 248, § 4, 25 Stat. 140, 142; May 30, 1888, c. 337, § 4, 25 Stat. 162, 163; June 26, 1888, c. 494, § 4, 25 Stat. 205, 207; Oct. 1, 1890, c. 1248, § 4, 26 Stat. 632, 634; July 30, 1892, c. 329, § 4, 27 Stat. 336, 338; Mar. 1, 1893, c. 188, § 4, 27 Stat. 524, 525; Aug. 4, 1894, c. 215, § 4, 28 Stat. 229, 230; Mar. 23, 1898, c. 87, § 4, 30 Stat. 341, 342.

Referring to Laws of Kansas: Acts of July 4, 1884, c. 179, § 4, 23 Stat. 73, 74; June 21, 1890, c. 479, § 4, 26 Stat. 170, 171; June 30, 1890, c. 638, § 4, 26 Stat. 184, 185; Sept. 26, 1890, c. 947, § 4, 26 Stat. 485, 487; Feb. 27, 1893, c. 171, § 4, 27 Stat. 492, 493; Mar. 18, 1896, c. 60, § 4, 29 Stat. 69, 70; Mar. 30, 1896, c. 82, § 4, 29 Stat. 80, 82.

Referring to Laws of Arkansas: Acts of June 1, 1886, c. 395, § 4, 24 Stat. 73, 74; July 6, 1886, c. 744, § 4, 24 Stat. 124, 125; Feb. 18, 1888, c. 13, § 4, 25 Stat. 35, 37; May 30, 1888, c. 337, § 4, 25 Stat. 162, 163; Feb. 26, 1889, c. 280, § 4, 25 Stat. 745, 746; Feb. 24, 1891, c. 288, § 4, 26 Stat. 783, 785; Mar. 3, 1891, c. 535, § 4, 26 Stat. 844, 846; Feb. 24, 1896, c. 30, § 6, 29 Stat. 13, 15; Mar. 2, 1896, c. 38, § 4, 29 Stat. 40, 41; Apr. 6, 1896, c. 93, § 4, 29 Stat. 86, 88; Jan. 29, 1897, c. 108, § 4, 29 Stat. 502, 504; Mar. 30, 1898, c. 104, § 5, 30 Stat. 347, 349; Jan. 28, 1899, c. 65, § 5, 30 Stat. 806, 808; Feb. 4, 1899, c. 88, § 6, 30 Stat. 816, 818; Mar. 3, 1899, c. 453, § 6, 30 Stat. 1368, 1370.

Referring to Laws of Territory of Oklahoma: Act of Feb. 28, 1902, c. 124, § 4, 32 Stat. 43, 45.

In *Dow v. Beidelman*, 125 U. S. 680, the statute of Arkansas, enacted in April, 1887 (April 4, 1887, Acts 1887, p. 227) which established three cents a mile as the maximum fare for carrying passengers within the State on railroads over seventy-five miles in length, was sustained against the objection of the owners of the Memphis and Little Rock Railroad who attacked the act as confiscatory and arbitrary in its classification. The same statute was again upheld in *St. Louis & San Francisco Railway Co. v. Gill*, 156 U. S. 649. In *Chicago &c. Railway Co. v. Minnesota*, 134 U. S. 418, the statute of that State (March 7, 1887, Gen. Laws 1887, c. 10) creating a commission with power to prescribe intrastate rates was adjudged to be invalid, but this was upon the ground that the act as construed by the state court made the rates published by the commission final and conclusive and precluded any judicial inquiry whether they were reasonable. In *Chicago &c. Railway Co. v. Wellman*, 143 U. S. 339, the act of the legislature of Michigan (June 28, 1889, Pub. Laws 1889, p. 282) fixing the maximum fare for passengers within the State at two cents a mile in the case of companies whose gross earnings exceeded three thousand dollars a mile was unsuccessfully assailed as confiscatory and no contention was advanced that such an act operating throughout the State was an unwarrantable interference with interstate commerce.

In *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, the trustee of a railroad mortgage attacked the statute of Texas (April 3, 1891, Gen. Laws 1891, c. 51, p. 55) which established a railroad commission with authority to regulate tariffs, and the order of the commission providing a schedule of classified rates for the transportation of goods within the State. The challenge was of the tariff as a whole and the inquiry was whether the body of rates was unreasonable and such as to work a practical destruction of rights of property. Viewed in this aspect, the court, upon the allegations admitted by demurrer, held the action of the commission to be beyond its constitutional power and affirmed the decree of the Circuit Court enjoining the rates. The decree, however, was reversed so far as it restrained the commission from discharging the duties imposed by the statute and from proceeding to prescribe reasonable rates and regulations. A further question was presented in *Regan v. Mercantile Trust Company*, 154 T. S. 413, in respect to the same statute and order as applied to the Texas and Pacific Railway Company which had been organized under the laws of the United States (March 3, 1871, 16

Stat. 573, c. 122) and operated its road not only within that State but also for several hundred miles outside. It was insisted that this company was "not subject to the control of the State, even as to rates for transportation wholly within the State," the argument being that it was not within the state power to limit the Federal franchise to collect tolls. But the court held that the act of Congress did not go to the extent asserted but left the company, as to its intrastate business, subject to state authority.

The effect of intrastate rates upon interstate rates was urged in *Smyth v. Ames*, 169 U. S. 466, and in the cases decided therewith. These suits were brought by stockholders of the Union Pacific Railway Company, the Chicago and Northwestern Railroad Company and the Chicago, Burlington and Quincy Railroad Company, to enjoin the enforcement of the act of the legislature of Nebraska passed in 1893 (April 12, 1893, Acts 1893, c. 24). This was a comprehensive statute classifying the freight transported from any point in Nebraska to any other point in that State and prescribing tables of maximum rates. The companies affected were interstate carriers engaged in a vast commerce only a small portion of which was wholly local to the State. On the eastern boundary lay Omaha, a city of large importance in interstate trade, situated on the Missouri river with Council Bluffs, in the State of Iowa, directly opposite. The point was distinctly made in the Circuit Court that the statute interfered with interstate commerce because, first, it established a classification of freights different from that which prevailed west of Chicago, and second, by reducing local rates it necessarily reduced rates on interstate business. Mr. Justice Brewer, who tried the cases, overruled these objections holding that neither the convenience of the carriers nor the consequences of competition with respect to interstate rates could be pleaded "in restraint of the otherwise undeniable power of the State." *Ames v. Union Pacific Railway Co.*, 64 Fed. Rep. 165, 171, 172. Having disposed of this contention, the court considered the question of the reasonableness of the rates and reached the conclusion that they were invalid because they amounted to a deprivation of the carriers' rights of property. On appeal to this court the counsel for the appellees directed attention to the conditions of transportation in Nebraska. It was argued that the local traffic was carried over the same tracks, in the same trains and often in the same cars with the interstate traffic; that to separate the cost of carrying the one

sort of traffic from that of the other was a "manifest impossibility"; and that it was a necessary consequence of existing conditions that, if Nebraska controlled the local rates, it at the same time controlled the interstate rates. But this contention was not sustained and the affirmance of the decree was placed upon the distinct ground that the rates were confiscatory. It was ruled that the reasonableness of intrastate rates was to be determined by considering the intrastate business separately. In answer to the suggestion that the conditions of business might have changed for the better since the decrees, the court called attention to the proviso in the decrees intended to meet such a case, adding that if the Circuit Court found that conditions were such as to permit the application of the state rates without depriving the carriers of just compensation it would "be its duty to discharge the injunction" and to make whatever order was necessary "to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute." (*Id.*, p. 550; see *Smyth v. Ames*, 171 U. S. 361, 365.)

In that one of the *Smyth Cases* which was brought by the stockholders of the Union Pacific Railway Company not only was the case presented of a trunk line crossing the State with a relatively small proportion of business local to Nebraska, but the company had been formed by a consolidation of several companies by authority of Congress, one of them being the Union Pacific Railroad Company, incorporated by the act of July 1, 1862, c. 120, 12 Stat. 489. By this act (§ 18, *id.* 497), it was expressly provided that Congress might reduce the rates of fare if unreasonable and might fix the same by law whenever the net earnings of the entire road and telegraph should exceed a certain amount. But this language, while showing that Congress intended to reserve the power to prevent unreasonable exactions, was not deemed to be equivalent to a declaration that the States through which the road might be constructed should not regulate rates for intrastate transportation. The court said: "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. . . . Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in

the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits." (169 U. S., pp. 521, 522.) It is plain that had the intrastate rates, established by the comprehensive statute of Nebraska, not been found to be confiscatory they would have been sustained in their application to all intrastate traffic notwithstanding the reserved power of Congress over the Union Pacific line and despite the argument based upon the interdependence of interstate and intrastate rates.

The cases of *Louisville & Nashville Railroad Co. v. Kentucky*, 183 U. S. 503, and *Louisville & Nashville Railroad Co. v. Eubank*, 184 U. S. 27, concerned the validity of the long and short haul provision of the constitution of Kentucky adopted in 1891. In the first case, violation was charged with respect to the transportation of coal from Altamont to Lebanon, an intermediate station, as compared with charges for transportation from Altamont to Elizabethtown and Louisville, all places being within Kentucky. The difference in rate was justified by the company on the ground that at Louisville the coal hauled from Altamont came into competition with that brought down the Ohio River and at Elizabethtown with western Kentucky coal brought there by the Illinois Central Railroad. The contention that the state provision operated as an interference with interstate commerce was presented and overruled, the court saying: "It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, and the long and short distances mentioned are evidently distances upon the railroad line within the State. The particular case before us is one involving only the transportation of coal from one point in the State of Kentucky to another by a corporation of that State. It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce; that the interference with the commercial power of the general government to be unlawful must

be direct, and not the merely incidental effect of enforcing the police powers of a State." (183 U. S., pp. 518, 519.) In the *Eubank Case*, which had been argued before the first case was decided, it appeared that the state court had construed the same provision of the Kentucky constitution as embracing a long haul from a place outside to one within the State (Nashville and Louisville) and a shorter haul on the same line and in the same direction between points within the State. The court held that, so construed, the provision was invalid as being a regulation of interstate commerce because it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law. (184 U. S., pp. 41, 43.) The authority of the former decision upholding the state law, as applied to places all of which were within the State, was in no way impaired and the court fully recognized the power of the State to prescribe maximum charges for intrastate traffic although carried over an interstate road to points on the state line. (*Id.*, pp. 33, 42.)

The case of *Minneapolis & St. Louis Railroad Co. v. Minnesota*, 186 U. S. 257, involved shipments of hard coal in carload lots from Duluth, Minnesota, to points in the southern and western portions of that State. The Railroad and Warehouse Commission of Minnesota, in 1899, prescribed a joint rate to be observed by the St. Paul and Duluth Railroad Company, the Minneapolis and St. Louis Railroad Company and other carriers. The state court directed the issue of a writ of mandamus to compel compliance with the order. It was objected that the act under which the order was made was unconstitutional so far as it assumed to establish joint through rates over the lines of independent connecting railroads and to divide joint earnings, and that the tariff as fixed was not compensatory. This court affirmed the judgment. In *Alabama & Vicksburg Railroad Co. v. Mississippi Railroad Commission*, 203 U. S. 496, the company made what it called a "rebilling rate" on grain shipped from Vicksburg to Meridian, Mississippi, which was applicable only in case of shipments received at Vicksburg over the Shreveport line. It gave, however, to such shippers an option for a specified time to send other grain from Vicksburg instead, and thus it was in fact a local rate. To end this discrimination, the state commission, in 1903, fixed the same rate for all grain products shipped from Vicksburg to Meridian. It was urged that the effect of the order would be to force the plaintiff to enter into joint through interstate tariffs

and divisions with all lines reaching Vicksburg by rail or river whether it desired such arrangements or not. The court sustained the order holding that it was competent for the State to enforce equality as to local transportation, and that this equality could not be defeated "in respect to any local shipments by arrangements made with or to favor outside companies."

In *Northern Pacific Railway Co. v. North Dakota*, 216 U. S. 579, the Attorney General of North Dakota charged the company with continuous violation of a law fixing rates for the carriage of coal within the State (North Dakota, Laws of 1907, c. 51) and asked for an injunction. It appears by the record that in its return to the rule to show cause in the state court, the company alleged that the statute was void because repugnant to the commerce clause and also that the rate fixed thereby was confiscatory. In support of the last contention the return set forth that the maximum rates for carrying coal which the company was allowed to charge under the act in question, were greatly lower than the rates for similar service fixed by Minnesota for that State (reference being made to c. 322 of the Laws of 1907, the commodity rate act now in question) and those fixed by the Railroad Commissions of Illinois and Iowa, respectively; and that the conditions existing in North Dakota made it impossible to transport coal at a less rate than in the States named. The contention that the act violated the interstate commerce clause was said by the Supreme Court of the State to be based upon the assumption that state regulation of local rates on interstate lines amounted to an interference with interstate commerce. In view of the decisions of this court, the last question was not considered open to debate. *State v. Northern Pacific Railway Co.*, 19 N. Dak. 45, 56. This ruling was not challenged by the argument for the plaintiff in error here, and the question as to interference with interstate commerce was treated as removed from the case by the holding of the state court that the rates applied only to transportation within the State. (216 U. S., p. 580.)

To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the State may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the Constitution which, creating a Nation, equipped it with an authority, supreme and plenary,

to control National commerce and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action. But, as we said at the outset, our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. It thus clearly appears that, under the established principles governing state action, the State of Minnesota did not transcend the limits of its authority in prescribing the rates here involved, assuming them to be reasonable intrastate rates. It exercised an authority appropriate to its territorial jurisdiction and not opposed to any action thus far taken by Congress.

The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention. It is urged that the same right-of-way, terminals, rails, bridges, and stations are provided for both classes of traffic; that the proportion of each sort of business varies from year to year and, indeed, from day to day; that no division of the plant, no apportionment of it between interstate and local traffic, can be made to-day, which will hold to-morrow; that terminals, facilities and connections in one State aid the carrier's entire business and are an element of value with respect to the whole property and the business in other States; that securities are issued against the entire line of the carrier and cannot be divided by States; that tariffs should be made with a view to all the traffic of the road and should be fair as between through and short-haul business; and that, in substance, no regulation of rates can be just, which does not take into consideration the whole field of the carrier's operations, irrespective of state lines. The force of these contentions is emphasized in these cases, and in others of like nature, by the extreme difficulty and intricacy of the calculations which must be made in the effort to establish a segregation of intrastate business for the purpose of determining the return to which the carrier is properly entitled therefrom.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which sub-

stantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

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HOUSTON, EAST AND WEST TEXAS RAILWAY
COMPANY v. UNITED STATES.

TEXAS AND PACIFIC RAILWAY COMPANY v.
UNITED STATES.

234 U. S. 342 (1914).

The facts are stated in the opinion.

Mr. Hiram M. Garwood, with whom *Mr. Maxwell Evarts*, *Mr. James G. Wilson*, *Mr. George Thompson*, *Mr. W. L. Hall* and *Mr. Thomas J. Freeman* were on the brief, for appellants.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ruffin G. Pleasant, Attorney General of the State of Louisiana, and *Mr. Luther M. Walter*, with whom *Mr. W. M. Barrow*, *Mr. M. W. Borders* and *Mr. John S. Burchmore* were on the brief, for the Railroad Commission of Louisiana, Intervenor.

MR. JUSTICE HUGHES delivered the opinion of the court.

These suits were brought in the Commerce Court by the Houston, East & West Texas Railway Company, and the Houston & Shreveport Railroad Company, and by the Texas & Pacific Railway Company, respectively, to set aside an order of the Interstate Commerce Commission, dated March 11, 1912, upon the ground that it exceeded the Commission's authority. Other

railroad companies¹ intervened in support of the petitions, and the Interstate Commerce Commission and the Railroad Commission of Louisiana intervened in opposition. The petitions were dismissed. 205 Fed. Rep. 380.

The order of the Interstate Commerce Commission was made in a proceeding initiated in March, 1911, by the Railroad Commission of Louisiana. The complaint was that the appellants, and other interstate carriers, maintained unreasonable rates from Shreveport, Louisiana, to various points in Texas, and, further, that these carriers in the adjustment of rates over their respective lines unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas. The carriers filed answers; numerous pleas of intervention by shippers and commercial bodies were allowed; testimony was taken and arguments were heard.

The gravamen of the complaint, said the Interstate Commerce Commission, was that the carriers made rates out of Dallas and other Texas points into eastern Texas which were much lower than those which they extended into Texas from Shreveport. The situation may be briefly described: Shreveport, Louisiana, is about 40 miles from the Texas state line, and 231 miles from Houston, Texas, on the line of the Houston, East & West Texas and Houston & Shreveport Companies (which are affiliated in interest); it is 189 miles from Dallas, Texas, on the line of the Texas & Pacific. Shreveport competes with both cities for the trade of the intervening territory. The rates on these lines from Dallas and Houston, respectively, eastward to intermediate points in Texas were much less, according to distance, than from Shreveport westward to the same points. It is undisputed that the difference was substantial and injuriously affected the commerce of Shreveport. It appeared, for example, that a rate of 60 cents carried first class traffic a distance of 160 miles to the eastward from Dallas, while the same rate would carry the same class of traffic only 55 miles into Texas from Shreveport. The first class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents. The rate on wagons from Dallas to Marshall, Texas, 147.7 miles was 36.8 cents, and from Shreveport to Marshall, 42 miles, 56 cents. The rate on

¹ The Missouri, Kansas & Texas Railway Company of Texas, the St. Louis Southwestern Railway Company, and the St. Louis Southwestern Railway Company of Texas.

furniture from Dallas to Longview, Texas, 124 miles, was 24.8 cents, and that from Shreveport to Longview, 65.7 miles, was 35 cents. These instances of differences in rates are merely illustrative; they serve to indicate the character of the rate adjustment.

The Interstate Commerce Commission found that the interstate class rates out of Shreveport to named Texas points were unreasonable, and it established maximum class rates for this traffic. These rates, we understand, were substantially the same as the class rates fixed by the Railroad Commission of Texas, and charged by the carriers, for transportation for similar distances in that State. The Interstate Commerce Commission also found that the carriers maintained "higher rates from Shreveport to points in Texas" than were in force "from cities in Texas to such points under substantially similar conditions and circumstances," and that thereby "an unlawful and undue preference and advantage" was given to the Texas cities and a "discrimination" that was "undue and unlawful" was effected against Shreveport. In order to correct this discrimination, the carriers were directed to desist from charging higher rates for the transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances, as the Commission found that relation of rates to be reasonable. 23 I. C. C. 31, 46-48.

The order in question is set forth in the margin.¹ The report states that under this order it will be the duty of the companies

¹ "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That defendants The Texas & Pacific Railway Company, The Houston, East & West Texas Railway Company, and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting their present class rates for the transportation of traffic from Shreveport, La., to the points in Texas hereinafter mentioned on their respective lines, as the Commission in said report finds such rates to be unjust and unreasonable.

"It is further ordered, That defendant The Texas & Pacific Railway Company be, and it is hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force there-

"to duly and justly equalize the terms and conditions" upon which they will extend "transportation to traffic of a similar character moving into Texas from Shreveport with that moving wholly within Texas," but that, in effecting such equalization, the class scale rates as prescribed shall not be exceeded.

In their petition in the Commerce Court, the appellants assailed the order in its entirety, but subsequently they withdrew

after during a period of not less than two years, and apply to the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered, That defendants The Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, and apply to the transportation of traffic from Shreveport, La., to the below-named points in Texas, class rates which shall not exceed the following, in cents per 100 pounds, which rates are found by the Commission in its report to be reasonable, to wit: (rates inserted).

"It is further ordered, That defendant The Texas & Pacific Railway Company be, and it is hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Dallas, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Dallas, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"It is further ordered, That defendants The Houston, East & West Texas Railway Company and Houston & Shreveport Railroad Company be, and they are hereby, notified and required to cease and desist, on or before the 1st day of May, 1912, and for a period of not less than two years thereafter abstain, from exacting any higher rates for the transportation of any article from Shreveport, La., to Houston, Tex., and points on its line intermediate thereto, than are contemporaneously exacted for the transportation of such article from Houston, Tex., toward said Shreveport for an equal distance, as said relation of rates has been found by the Commission in said report to be reasonable.

"And it is further ordered, That said defendants be, and they are hereby, notified and required to establish and put in force, on or before the 1st day of May, 1912, and maintain in force thereafter during a period of not less than two years, substantially similar practices respecting the concentration of interstate cotton at Shreveport, La., to those which are contemporaneously observed by said defendants respecting the concentration of cotton within the state of Texas, provided the practices adopted shall be justifiable under the act to regulate commerce and applicable fairly under like conditions elsewhere on the lines of such defendants."

their opposition to the fixing of maximum class rates and these rates were put in force by the carriers in May, 1912.

The attack was continued upon that portion of the order which prohibited the charge of higher rates for carrying articles from Shreveport into Texas than those charged for eastward traffic from Dallas and Houston, respectively, for equal distances. There are, it appears, commodity rates fixed by the Railroad Commission of Texas for intrastate hauls, which are substantially less than the class, or standard, rates prescribed by that Commission; and thus the commodity rates charged by the carriers from Dallas and Houston eastward to Texas points are less than the rates which they demand for the transportation of the same articles for like distances from Shreveport into Texas. The present controversy relates to these commodity rates.

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable its correction was beyond the Commission's power. Manifestly the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the appellants from further obligation to observe the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount char-

acter of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. *Gibbons v. Ogden*, 9 Wheat. 1, 196, 224; *Brown v. Maryland*, 12 Wheat. 419, 446; *County of Mobile v. Kimball*, 102 U. S. 691, 696, 697; *Smith v. Alabama*, 124 U. S. 45, 473; *Second Employers' Liability Cases*, 223 U. S. 1, 47, 53, 54; *Minnesota Rate Cases*, 230 U. S. 352, 398, 399.

Congress is empowered to regulate, — that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (*The Daniel Ball*, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (*County of Mobile v. Kimball*, *supra*); 'to foster, protect, control and restrain' (*Second Employers' Liability Cases*, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one

involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field. *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, 221 U. S. 612, 618; *Southern Railway Co. v. United States*, 222 U. S. 20, 26, 27; *Second Employers' Liability Cases*, *supra*, pp. 48, 51; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 205, 213; *Minnesota Rate Cases*, *supra*, p. 431; *Illinois Central Railroad Co. v. Behrens*, 233 U. S. 473.

In *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission*, *supra*, the argument against the validity of the Hours of Service Act (March 4, 1907, c. 2939, 34 Stat. 1415) involved the consideration that the interstate and intrastate transactions of the carriers were so interwoven that it was utterly impracticable for them to divide their employes so that these who were engaged in interstate commerce should be confined to that commerce exclusively. Employes dealing with the movement of trains were employed in both sorts of commerce; but the court held that this fact did not preclude the exercise of Federal power. As Congress could limit the hours of labor of those engaged in interstate transportation, it necessarily followed that its will could not be frustrated by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations. Again, in *Southern Railway Co. v. United States*, *supra*, the question was presented whether the amendment to the Safety Appliance Act (March 2, 1903, c. 976, 32 Stat. 943) was within the power of Congress in view of the fact that the statute was not confined to vehicles that were used in interstate traffic but also embraced those used in intrastate traffic. The court answered affirmatively, because there was such a close relation between the two classes of traffic moving over the same railroad as to make it certain that the safety of the interstate traffic, and of those employed in its movement, would be promoted in a real and substantial sense by applying the requirements of the act to both classes of vehicles. So, in the *Second Employers' Liability Cases*, *supra*, it was insisted that while Congress had the authority to regulate the liability of a carrier for injuries sustained by one employe through the negligence of another, where all were engaged in interstate commerce, that power did not embrace instances where the negligent em-

ployé was engaged in intrastate commerce. The court said that this was a mistaken theory, as the causal negligence when operating injuriously upon an employé engaged in interstate commerce had the same effect with respect to that commerce as if the negligent employé were also engaged therein. The decision in *Employers' Liability Cases*, 207 U. S. 463, is not opposed, for the statute there in question (June 11, 1906, c. 3073, 34 Stat. 232) sought to regulate the liability of interstate carriers for injuries to any employé even though his employment had no connection whatever with interstate commerce. (See *Illinois Central R. R. Co. v. Behrens*, *supra*.)

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize the carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted — as the Government has well said in its argument in support of the Commission's order — that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carrier's interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. This question was presented with respect to the long and short haul provision of the Kentucky constitution, adopted in 1891, which the court had before it in *Louisville & Nashville R. R. Co. v. Eubank*, 184 U. S. 27. The state court had construed this provision as embracing a long haul, from a place outside to one within the State, and a shorter haul on the same line and in the same direction between points within the State. This court held that, so construed, the provision was invalid as being a regulation of interstate commerce because 'it linked the interstate rate to the rate for the shorter haul and thus the interstate charge was directly controlled by the state law.' See 230 U. S. pp. 428, 429. It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer.

Second. The remaining question is with regard to the scope of the power which Congress has granted to the Commission.

Section three of the Act to Regulate Commerce provides (February 4, 1887, c. 104, 24 Stat. 379, 380):

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. The purpose of the measure was thus emphatically stated in the elaborate report of the Senate Committee on Interstate Commerce which accompanied it: "The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations. . . ." (Senate Report No. 46, 49th Cong., 1st Sess., p. 215.)

The opposing argument rests upon the proviso in the first section of the act which in its original form was as follows: "*Provided, however*, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid." When the act was amended so as to confer upon the Commission the authority to prescribe maximum interstate rates, this proviso was reenacted; and when the act was extended to include telegraph, telephone and cable companies engaged in interstate business, an additional clause was inserted so as to exclude intrastate messages. See acts of

June 29, 1906, c. 3591, 34 Stat. 584; June 18, 1910, c. 309, 36 Stat. 539, 545.

Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly — in the absence of a finding by the Commission of unjust discrimination — intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States. This was the question recently decided by this court in the *Minnesota Rate Cases*, *supra*. There, the State of Minnesota had established reasonable rates for intrastate transportation throughout the State and it was contended that, by reason of the passage of the Act to Regulate Commerce, the State could no longer exercise the state-wide authority for this purpose which it had formerly enjoyed; and the court was asked to hold that an entire scheme of intrastate rates, otherwise validly established, was null and void because of its effect upon interstate rates. There had been no finding by the Interstate Commerce Commission of any unjust discrimination. The present question however, was reserved, the court saying (230 U. S. p. 419): "It is urged, however, that the words of the proviso" (referring to the proviso above-mentioned) "are susceptible of a construction which would permit the provisions of section three of the act, prohibiting carriers from giving an undue or unreasonable preference or advantage to any locality, to apply to unreasonable discriminations between localities in different States, as well when arising from an intrastate rate as compared with an interstate rate as when due to interstate rates exclusively. If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts."

Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transporta-

tion and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one State.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation. It is urged that the practical construction of the statute has been the other way. But, in assailing the order, the appellants ask us to override the construction which has been given to the statute by the authority charged with its execution, and it cannot be said that the earlier action of the Commission was of such a controlling character as to preclude it from giving effect to the law. The Commission, having before it a plain case of unreasonable discrimination on the part of interstate carriers against interstate trade, carefully examined the question of its authority and decided that it had the power to make this remedial order. The Commerce Court sustained the authority of the Commission and it is clear that we should not reverse the decree unless the law has been misapplied. This we cannot say; on the contrary, we are convinced that the authority of the Commission was adequate.

The further objection is made that the prohibition of section three is directed against unjust discrimination or undue preference only when it arises from the voluntary act of the carrier and does not relate to acts which are the result of conditions wholly beyond its control. *East Tennessee &c. Rwy. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 18. The reference is not to any inherent lack of control arising out of traffic conditions, but to the requirements of the local authorities which are assumed to be binding upon the carriers. The contention is thus merely a

repetition in another form of the argument that the Commission exceeded its power; for it would not be contended that local rules could nullify the lawful exercise of Federal authority. In the view that the Commission was entitled to make the order, there is no longer compulsion upon the carriers by virtue of any inconsistent local requirement. We are not unmindful of the gravity of the question that is presented when state and Federal views conflict. But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.

In conclusion: Reading the order in the light of the report of the Commission, it does not appear that the Commission attempted to require the carriers to reduce their interstate rates out of Shreveport below what was found to be a reasonable charge for that service. So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them, and they are free to comply with the order by so adjusting the other rates, to which the order relates, as to remove the forbidden discrimination. But this result they are required to accomplish.

The decree of the Commerce Court is affirmed in each case.

Affirmed.

MR. JUSTICE LURTON and MR. JUSTICE PITNEY dissent.

PENNSYLVANIA RAILROAD CO. v. INTERSTATE
COMMERCE COMMISSION.

UNITED STATES COMMERCE COURT.

193 Fed. Rep. 81 (1911).

The facts are stated in the opinion.

Mr. F. D. McKenney, with whom *Mr. Henry Wolf Bikle*, *Mr. John G. Johnson*, and *Mr. Francis I. Gowen* were on the brief, for petitioner.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. James A. Fowler*, assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for Interstate Commerce Commission.

Mr. A. M. Liveright for Hillsdale Coal & Coke Co. and Clark Brothers Coal Mining Company.

Mr. William A. Glasgow, jr., for W. F. Jacoby & Company.

Before KNAPP, presiding judge, and ARCHBALD, HUNT, CARLAND, and MACK, judges.

KNAPP, *Presiding Judge*:

On January 1, 1906, the petitioner adopted and put in force the following rule or regulation for the allotment and distribution of cars to bituminous coal mines:

"Commencing January 1st, 1906, assigned cars, i. e., cars for Pennsylvania Railroad fuel supply, foreign railroad cars specially consigned for the fuel supply of railroads consigning such cars, and individual cars assigned by the owners to specified mines for loading, will be charged against the capacity of the mines at which they are placed. The difference between the rated capacity of a mine and the capacity of the assigned cars placed for loading will be the rated capacity on which all other cars will be prorated."

Some two years later, as the record indicates, certain mine operators, viz, The Hillsdale Coal & Coke Company, Clark Brothers Coal Mining Company, and W. F. Jacoby & Company, filed complaints against petitioner with the Interstate Commerce Commission, alleging that the regulation above quoted was discriminatory, and therefore unlawful, the proceedings being known on the Commission's docket as Nos. 1063, 1111, and 1139. To these complaints answers were made in due time, and the Commission, on March 7, 1910, after full hearing, entered two orders, one entitled in No. 1063 and the other in Nos. 1111 and 1139. These orders are substantially alike, and the material parts of each read as follows:

"This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as 'assigned cars,' from the

rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

The dates fixed for these orders to become effective were afterwards postponed to December 1, 1910, at which time they went into effect and have since been complied with by petitioner. In the meantime, and on October 4, 1910, the bill herein was filed against the Commission, in the Circuit Court of the United States for the Eastern District of Pennsylvania, to set aside and annul the orders in question for reasons that will be hereafter stated. Pleading to this bill, the Commission demurred to the first nine paragraphs and answered, by admissions and denials only, the allegations in the remaining paragraphs. About the same time the Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company, the complainants before the Commission in Nos. 1063 and 1111, obtained leave from the Circuit Court to intervene, and thereupon filed their joint demurrer to the bill, specifying various grounds of objection thereto. The case was transferred to this court upon its organization, and here the United States intervened, on leave granted, and adopted as its own the demurrer and answer of the Commission. When the case came on for final hearing on the pleadings then on file, the firm of W. F. Jacoby & Company, complainants before the Commission in No. 1139, were allowed to intervene, and they also adopted as their own the pleadings of the other interveners. The sole question to be decided is the power of the Commission to

make the orders which the suit seeks to set aside, and that question arises on the demurrers above mentioned.

The authority of the Commission to regulate the distribution of cars, particularly coal cars, in times of car shortage has been the subject of considerable litigation; and such authority has been so fully upheld and defined in recent decisions of the Supreme Court that any extended discussion of this case would seem to be unsuitable.

It is admitted, or at least not denied, that the Commission had jurisdiction of the parties to and the subject matter of the proceedings which resulted in the orders sought to be enjoined, and no question is made as to the regularity of those proceedings. Indeed, the precise grounds upon which these orders are claimed to be illegal are not made altogether clear, though it is less difficult to discern the purpose of petitioner in prosecuting the suit. It seems to be conceded that if the orders apply only to cars furnished for interstate shipments — as the recital which precedes the mandatory provisions might be held to imply — they are undoubtedly valid. But the petitioner contends that they apply also, or may be construed and enforced by the Commission as applying, to cars for intrastate as well as interstate shipments, and that so construed they are in excess of the Commission's authority; and this appears to be the sole objection upon which petitioner relies.

Assuming without deciding that the orders in question should be or can be so interpreted, we are nevertheless of opinion that they are within the powers delegated to the Commission. In the course of its business as a common carrier the petitioner transports large quantities of coal to both intrastate and interstate destinations, and its cars are used indiscriminately in this service. The coal operators whose complaints were investigated by the Commission, and at whose instance the orders were made, ship their products to points within or points without the State of Pennsylvania, as market conditions or other trade interests may dictate. A large part of the business is interstate, but it is conducted in its entirety by shipper and carrier alike as a unit of operation with little or no regard to the boundaries of the State in which the traffic originates.

In view of these facts, which are wholly undisputed, we see no reason to doubt the authority of the Commission to make these orders, even though they are intended to have the application and effect which petitioner appears to apprehend. This conclu-

sion necessarily follows, as we conceive, from the principles so clearly stated and so instructively discussed by Mr. Justice (now Chief Justice) White in *Interstate Com. Com'n v. Illinois Central R. Co.* (215 U. S., 452). Indeed, we are unable to find any substantial basis for distinguishing that case from the one at bar. The subject matter is the same in both, the facts are strikingly similar, and the orders of the Commission of nearly identical import. In that case, as in this, the Commission found as a fact, upon evidence which permitted different inferences to be drawn, that the regulations complained of operated with discriminating effect, and under such circumstances the conclusions of the Commission, as to matters within its jurisdiction, are binding upon the courts.

This conclusion is fortified by the recent decision of the Supreme Court in *Southern Railway Co. v. United States* (decided October 30, 1911). That case, it is true, arose under the safety-appliance laws, but the controlling principle involved applies equally, in our judgment, to the question here presented.

It may be true, as petitioner contends, that the rules condemned by the Commission are more equitable than those which conform to the orders in question, but that would in no wise justify annulling the orders, as was distinctly held in the *Illinois* case, *supra*.

It may also be true that the enforcement of regulations in conformity with these orders, if applied to cars for intrastate as well as interstate shipments, would result in some conflict with the duties of petitioner under the laws of Pennsylvania — though how this could happen is not very apparent — but if this is or proves to be the case, it furnishes no ground for our interference, since Federal authority to the full extent that it may be exerted supercedes and limits State authority.

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Holding this opinion, we see no occasion for construing these orders. The sole question with us is the question of power; and if the orders here involved, upon any reasonable construction of their provisions, are within the powers conferred upon the Commission, the exercise of those powers, under the circumstances of this case, must be upheld.

*The demurrers should be sustained and the petition dismissed with costs, and it will be so ordered.*¹

¹ Concurring opinion of Judge Carland is omitted.

INTERSTATE COMMERCE COMMISSION *v.* GOODRICH
TRANSIT COMPANY.

INTERSTATE COMMERCE COMMISSION *v.* SAME.

UNITED STATES *v.* WHITE STAR LINE.

UNITED STATES *v.* SAME.

224 U. S. 194 (1912).

The facts are stated in the opinion.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. James A. Fowler, Assistant to the Attorney General, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Ralph M. Shaw, with whom *Mr. John Barton Payne*, *Mr. Silas H. Strawn* and *Mr. Garrard B. Winston* were on the brief, for the appellees.

MR. JUSTICE DAY delivered the opinion of the court.

The appellees in these four cases are corporations organized under state laws and engaged in the carriage of passengers and freight by water upon the Great Lakes. They filed bills in the United States Circuit Court for the Northern District of Illinois to enjoin the enforcement of certain orders of the Interstate Commerce Commission. The cases were afterwards transferred to the United States Commerce Court.

The orders of the Commission complained of comprise: First, an order prescribing the method of accounts and bookkeeping as to the operating expenses of the carriers and a similar order as to bookkeeping concerning the operating revenues of the carriers; and, second, an order requiring a report of the carriers respecting their corporate organization, financial condition, etc.

The Government of the United States intervened and filed an answer in each case, but the cases were practically heard on demurrer, as the record discloses, and therefore the allegations of the bills well pleaded must be deemed to be true. The bills contain many conclusions, and argumentative deductions as to the effect of the orders upon the carriers, which, under the rules of

pleading, are not considered as admitted. *United States v. Ames*, 99 U. S. 35, 45.

The pertinent averments necessary to a decision of the cases, as we view them, show that the carriers are corporations organized under the laws of certain States of the Union; that they carry passengers and freight upon the Great Lakes between ports in different States, which they designate as their port-to-port interstate business; that they carry passengers and freight wholly within a State, which they designate as their port-to-port intrastate business; and that they also carry passengers and property in interstate commerce under joint tariffs in connection with certain railroad carriers of the United States with whom they have agreed upon joint through rates, which they designate as their joint rail and water business. As to the Goodrich Transit Company, it is averred that eighty per cent of its gross revenue is derived from its port-to-port interstate and intrastate business, and less than twenty per cent of its gross earnings is derived from its joint rail and water business. A like averment is made with respect to the White Star Line, except that it is said that in its business the revenue derived from joint rail and water traffic, as aforesaid, is less than one per cent of its entire revenue.

It is averred that the bookkeeping and accounting methods required by the orders of the Commission differ from those prescribed and now kept by the companies; that the orders of the Commission make no difference between the intrastate port-to-port business and the interstate port-to-port business and the joint rail and water business; and that the orders entered by the Commission prohibit the companies from keeping any accounts, records or memoranda other than those prescribed by the Commission in such orders.

In the White Star Line cases the bills contain an additional averment that that company operates two amusement parks, one at Tashmoo and one at Sugar Island, both in the State of Michigan, and in connection therewith owns, operates and derives revenue from lunch stands, merry-go-rounds, bowling alleys, bath houses, etc., and collects admission fees from people entering the parks. It complains that its business concerning said parks is included within the accounting methods prescribed by the Commission.

As to the report called for by the order of the Commission, it is averred that such report was not required because of any complaint filed against the corporations for the violation of the Act

to Regulate Commerce; that there is no statute requiring the report to be kept secret, and, if it is made public, the affairs of the companies will be thrown open to inspection to their injury; that a large number of the inquiries contained in the order of the Commission relate to details of the companies' business solely intrastate, or that which is from port to port; and that the report is not limited to the joint rail and water business of complainants.

There are also averments that the orders were unconstitutional, because the Commission, in undertaking to put in force such requirements, exceeded its authority in so far as the power was asserted to examine into the affairs of the companies not relating to their joint rail and water business, and having reference, as it was alleged, to their domestic business or interstate business not within the terms of the act.

The Commerce Court enjoined the execution of the orders (190 Fed. Rep. 943), declaring that (p. 966):

"It [the Commission] acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one State to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business, and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful."

The court held that the orders concerning the report and auditing would be lawful respecting the interstate business done by the carriers in connection with railroads, as provided by the act, but, in requiring a report concerning the other business of the companies and prescribing bookkeeping methods therefor, the Commission exceeded its authority, and the court granted the prayers of the petitioners for the orders of injunction, ordered a recast of the form of report in conformity with its opinion and remanded the cases to the Commission for that purpose.

Whether this order of the Commerce Court was correct or not primarily depends upon the construction of the Interstate Commerce Act and the extent to which, in the respect involved in these cases, the carriers herein interested are within the terms of the law. The terms of the act of Congress, as amended June 29, 1906, 34 Stat. 584, c. 3591, and in force at the time when these orders were made, are plain and simple, and, we think, not difficult to comprehend. They are: "The provisions of this act [to regulate commerce] shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, etc." The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one State was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic. The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier named therein. It may be that certain provisions of the act are in their nature applicable to some carriers and not to others; but we are only concerned to inquire in this case whether the carriers thus broadly brought within the terms of the act by § 1 thereof are subject to the provisions of the statute by the authority of which the Commission undertook to require the system of accounting and the report as to the organization and business of the corporations, and whether, if within the terms of the act, the orders are constitutionally made.

Certain it is that, when engaged in carrying on traffic under

joint rates with railroads, filed with the Commission, the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism and other practices denounced in the various sections of the act. They are undoubtedly subject to the provisions of § 12 of the act, which permits the Commission to inquire into the management of the business of all common carriers subject to the act and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers the full and complete information necessary to enable the Commission to carry out the objects for which it was created. The joint rates established are subject to revision by the Commission under § 15 of the act. We must remember, also, in this connection, that under § 21 of the act the Commission is required to make a report each year to the Congress containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

As to annual reports, the power conferred in § 20 of the act extends to all common carriers subject to the provisions of the act. The Commission is vested with authority to prescribe the manner in which such reports shall be made and to require specific answers to all questions as to which the Commission may need information. The report required in these cases was declared to be needed to enable the Commission to procure full information of the scope and character of the business of carriers by water within the jurisdiction of the Commission and of the extent of their operations, such as would enable the Commission to determine the form for annual report which would best give the information required by the Commission, and at the same time conform as nearly as may be to the accounting systems of carriers by water.

The form of report adopted by the Commission requires a showing as to the corporate organization of each carrier by water subject to the act, the companies owned by it and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and securities owned by it, together with all special funds and current assets and liabilities, as well as its funded in-

§ 12
Right to
inquire
into business

§ 15 rates

debtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind, or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows: The routes of the carrier and their mileage; a general description of the equipment owned, leased or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported, showing also whether originating on the carrier's line or received from a connecting line; and a general description of any separate business carried on by the carrier. But such report is no broader than the annual report of such carriers, as prescribed by the act, for § 20 provides that:

"Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employes and the salaries paid each class; the accidents to passengers, employes, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require."

*Sec. 20
uniform
system
of accounts*

As to the accounts, the statute permits the Commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The Commission may, the statute further provides, in its discretion, prescribe the forms of all accounts, records and memoranda to be kept by the common carriers, to which accounts the Commission shall

have access. And the act makes it unlawful for the carriers to keep any accounts, records or memoranda other than those prescribed by the Commission.

We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders and a report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in their accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way and to be open to the inspection of the Commission is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them.

There is nothing in the case of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, contrary to the conclusion herein announced. That case dealt with the authority of the Commis-

sion to compel the attendance and testimony of witnesses in cases where complaints had not been made. The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court. 211 U. S. pp. 421, 422.

The necessity of such accounts is emphasized under the English practice, and accounts and reports are required in great detail under the laws of that country.

In the report of the committee appointed by the Board of Trade under the Railway Regulation Acts to make inquiries with respect to the form and scope of the accounts and statistical returns rendered by railway companies the omission of the former law to make provision for any prescribed and uniform system of accounts is pointed out, and it is said:

"It is obviously of the first importance, from the point of view of comparison between the different railway companies, that there should be uniformity of practice among all the companies with regard to the keeping of accounts and statistics; that is to say, that every heading, both in the accounts and in the statistics, should bear precisely the same meaning in the case of all railways — should, in effect, be standardized."

The Railway Companies (Accounts and Returns) Act, December 16, 1911, 1 and 2 Geo. 5, c. 34, — to amend the laws with respect to accounts and returns of railway companies — contains requirements as to financial accounts and statistical returns which call for a uniform system of accounting, showing the organization and workings of the companies in great detail, together with statistical returns as to their business, subdivided so as to include all the operations of the companies as carriers and in all other enterprises in which they may engage.

The learned Commerce Court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the State and for ports beyond the State, and as a part of the

freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense — at least it would seem impracticable to separate it into its items so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress, and, conceding for this purpose that the regulating power of the Commission is limited so far as rates are concerned to joint rates of the character named in § 1, it is still essential that to enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it should be informed as to the matters contained in the report. Congress, in § 20, has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power.

It is contended that this construction of the statute enables the Commission not only to regulate the interstate business, but as well the wholly intrastate business of the complaining corporations, and is, therefore, beyond the power of Congress. Such cases are cited and relied upon by complainants as the *Employers' Liability Cases*, 207 U. S. 463, and *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514. In those cases acts of Congress and orders of executive departments were held void because they undertook to regulate matters wholly intrastate, as distinguished from those matters of an interstate character and within the legislative power of Congress. And what we have already said as to the character of these orders is enough to indicate that in our opinion they are not regulations of intrastate commerce.

Furthermore, it is said that such construction of § 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application

of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield v. Stranahan*, 192 U. S. 479; *Union Bridge Co. v. United States*, 204 U. S. 384; *United States v. Grimaud*, 220 U. S. 506.

In § 20 Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority.

And it is argued that Congress has no visitatorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court, from *Gibbons v. Ogden*, 9 Wheaton, 1, to its most recent deliverances. In *Hale v. Henkel*, 201 U. S. 43, 75, while general visitatorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the General Government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

As to one of the corporations it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts and whether charges of expense are made against one part of a business which ought to be made against another.

Bookkeeping, it is said, is not interstate commerce. True, it

is not. But bookkeeping may and ought to show how a business which, in part at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority.

We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under § 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law. It therefore follows that the Commerce Court erred in granting the injunctions and in remanding the cases to the Commission with instructions to recast its orders.

Judgments reversed.

THE DENVER & RIO GRANDE RAILROAD CO.
v. INTERSTATE COMMERCE COMMISSION.

UNITED STATES COMMERCE COURT.

195 Fed. Rep. 968. (1912).

Mr. Joel F. Vaile, with whom *Mr. E. N. Clark* and *Mr. A. C. Campbell* were on the brief, for petitioner.

Mr. P. J. Farrell, for the Interstate Commerce Commission.

Mr. Blackburn Esterline, special assistant to the Attorney General, with whom *Mr. Winfred T. Denison*, Assistant Attorney General, was on the brief, for the United States.

Before KNAPP, Presiding Judge, and ARCHBALD, HUNT, CARLAND, and MACK, Judges.

KNAPP, *Presiding Judge*:

This suit was brought to set aside an order of the Interstate Commerce Commission, dated November 26, 1909, which in effect required petitioner, the Denver & Rio Grande Railroad Co., to reduce its rate on beer in carloads, from Pueblo, Colo., to Leadville, Colo., when part of a through transportation from St. Louis, Mo., to Leadville, from 45 cents to 30 cents per hundred pounds.

The principal ground upon which the order of the Commission is claimed to be invalid, and the only one that needs to be dis-

cussed, is that the order relates to the transportation of property received, handled, transported, and delivered wholly within one State, which is said to be not within the jurisdiction of the Commission because of the first proviso in section one of the act to regulate commerce. It is conceded that the transportation in question was interstate commerce, because the traffic was carried by continuous movement from a point in one State to a point in another State, and was therefore subject to the regulating power of Congress, but the contention is made that the proviso mentioned covers such transportation as is here involved, and therefore excludes it from the authority of the Commission. The facts upon which this contention is based appear to be as follows:

The Missouri Pacific Railway Co. operates a line of railway from St. Louis to Pueblo, where it connects with a line of petitioner from Pueblo to Leadville and beyond. The rate affected by the order was applied to carload shipments of beer which originated in St. Louis during the years 1907 and 1908, and were transported therefrom by railroad through Pueblo to Leadville. The shipments in question were hauled by the Missouri Pacific to Pueblo and there delivered by that carrier without break of bulk to the Denver & Rio Grande, which completed the haul to Leadville. At the time these shipments moved, there was no joint rate of the two roads applying from St. Louis to Leadville, and the through charge was the local rate of the Missouri Pacific from St. Louis to Pueblo plus the local rate of petitioner from Pueblo to destination. In this connection it appears that petitioner had no joint rates with any of its eastern connections at Pueblo, or other Colorado common points, on traffic moving to or from points in Colorado on its lines west of Pueblo and other Colorado common points, but was a party to joint tariffs on traffic moving between eastern points and points west of Colorado — as, for example, Utah and transcontinental traffic.

The traffic in question was shipped by the William J. Lemp Brewing Co., of St. Louis, to the Baer Bros. Mercantile Co., of Leadville, the latter being the complainants at whose instance the rate in question was investigated and reduced by the Commission, and the transportation appears to have been conducted in the following manner:

Upon receiving a carload of beer at St. Louis the Missouri Pacific issued to the consignor, the William J. Lemp Brewing Co., a receipt for the same, showing on its face that it was to be delivered to Baer Bros. Mercantile Co. at Leadville, Colo., routed

via the Denver & Rio Grande. This receipt described the articles shipped, with their aggregate weight, and bore a notation to the effect that the shipment was tendered and received subject to the company's uniform bill of lading. The car in which the shipment was loaded was then moved by the Missouri Pacific on a local waybill from St. Louis to Pueblo, such waybill showing Baer Bros. Mercantile Co. as the consignee and Leadville as the destination, and containing a statement of the contents and weight of the car, with the freight charges of the Missouri Pacific computed on its local rate from St. Louis to Pueblo. Upon arrival at Pueblo the car was placed on the interchange track, where the Missouri Pacific and petitioner delivered carload traffic to each other. The agent of the Missouri Pacific at Pueblo thereupon delivered to the agent of petitioner what is known as a "transfer sheet," which showed the consignor and point of origin, the contents and weight of the car, the freight charges of the Missouri Pacific to Pueblo, and also the consignee and destination of the shipment. The car was then taken from the interchange track by petitioner and moved to Leadville on a local waybill which likewise named the consignor, and showed the consignee and destination, description of contents, the rate and charges to Pueblo, and the rate and charges of petitioner from Pueblo to Leadville. If the shipment were prepaid to destination, as generally seems to have been the case, the Missouri Pacific paid petitioner the amount of its charges from Pueblo to Leadville; if not prepaid, petitioner paid the Missouri Pacific the charges of that carrier to Pueblo and collected the entire charges from consignee at destination, such payments between the two roads being made in daily settlements. In either case the physical movement and handling of the car was precisely the same as would be the case under a joint rate and through bill of lading. The movement was continuous from origin to destination without the intervention of the consignor or consignee, and so far as they were concerned the transportation was like that over a single line. In control and management, and in fixing their respective local rates upon which these shipments moved, the Missouri Pacific and petitioner were entirely independent of each other, and there was no agreement or arrangement between them for through transportation from points on one line to points on the other, except such as is indicated by or may be implied from the manner in which such business was handled and their mutual dealings with respect thereto, as above described.

Upon these facts, as stated above, it is contended with much earnestness that petitioner was a purely local carrier within a single State of the traffic in question, and therefore as to such traffic not subject to the jurisdiction of the Commission because of the proviso in section 1, which reads as follows:

*"Provided, however, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid. * * *"*

Briefly stated, the argument of petitioner's counsel is this: That section I of the act defines the classes of carriers subject to its provisions; that it might be plausibly contended that the proviso aimed to exclude only their strictly intrastate business; but that this construction is inadmissible because of the concluding phrase "and not shipped to or from a foreign country from or to any State or Territory as aforesaid," that is to say, because intrastate business destined to or coming from a foreign country is not excluded; and that therefore it follows that as there may be foreign business handled wholly in one State and not excluded, so there may be interstate business handled wholly in one State which is excluded.

But it would also follow that the Congress, in devising a system of railway regulation, took care to include the intrastate carriage of *foreign* commerce — comparatively small in amount — and yet purposely exempted the intrastate carriage of *interstate* commerce, which aggregates a very large volume. Only the plainest language would impute to the law-making body such an inconsistent and irrational intention. It seems clear to us that the language in question should not be so construed, and we reject the contention of petitioner because, in our judgment, it is based upon an erroneous hypothesis.

Section one not only subjects to the act, first, certain carriers, but also, second, certain transportation. The proviso relates not to the carriers but to the transportation, and is therefore to be read in connection with the second clause of the section and not with the first. Summarized, the first clause relates to carriers engaged in transportation (a) wholly by rail, or (b) partly by rail and partly by water under a common arrangement, from (c) State to State, or (d) from the United States to or through an adjacent foreign country. For example, carriers transporting traffic by rail from Albany to New York for shipment to Europe would not

come under this definition whether or not there were a common arrangement for rail and water transportation, but carriers engaged in moving traffic from Albany to New York by rail and thence by water to New Orleans, or from Albany to Buffalo by rail and thence by water to Toronto, would come within the definition, if there were a common arrangement. It was interstate rail transportation that was primarily sought to be regulated, not interstate water transportation, and not the rail part, within a single State, of rail and water interstate transportation unless the rail carrier and the water carrier were under a common control management or arrangement.

But as to transportation to a foreign country, unless wholly by water from point of origin to final destination, Congress had a different and definite purpose. Even though in that case there were no common arrangement between the rail and water carrier, even though no regulation of the ocean carrier or the entirely independent lake or river carrier was intended, nevertheless Congress deemed it important to subject to the act, and therefore by the second clause did subject, that part of such transportation as was conducted within this country, although confined to a single State and conducted by a line that had no connection of any kind with an ocean carrier or with any interstate traffic. Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a carrier that confined its business to one State, and was not engaged in such interstate business as would bring it within the first clause, the proviso was added. The intended effect of this proviso was to exclude from the operation of the act such transportation, whether of persons or property, as was carried on wholly within *one* State, other than that going to or coming from a foreign country. Having given jurisdiction over certain transportation that could be conducted either in more than one or in only one State — that is, the inland transportation of commerce to or from foreign lands — it disclaimed jurisdiction over domestic traffic confined strictly and wholly to a single State. This disclaimer naturally contained the limiting clause "not shipped to or from a foreign country," to avoid any possible conflict with what immediately preceded, and to prevent an interpretation which would exclude the Albany-New York part of the Albany-New York-Europe transportation in the example above given. The proviso therefore must be regarded as a disclaimer and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain transportation, and

it does not in any way refer to the first grant of jurisdiction over certain carriers, either by way of disclaimer or by way of exception. It results that rail carriers engaged in such transportation of admittedly interstate commerce as is here considered were intended to be made subject to the act and are included in the classes of carriers to which the act applies.

This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation designed to include all interstate transportation wholly by railroad, or partly by railroad and partly by water when both are used under a common arrangement, and to exempt only that intrastate transportation which is not within the power of Congress to regulate. As was said by the Supreme Court in *Texas & Pacific Railway v. Interstate Com. Com.* (162 U. S., 212):

"It would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State), as well that between the States and Territories as that going to or coming from foreign countries."

Moreover, it seems plain to us upon the undisputed showing in this case that these carriers, as is now their duty under the amended act, have in fact established through routes from points on one road to points on the other, or at least between St. Louis and Leadville. Their physical connection at Pueblo by means of interchange tracks and otherwise, their constant acceptance of carload traffic from each other, their daily settlement of charges on such interchange traffic, and their habitual course of dealing with each other in the handling and transfer of through shipments, have brought about, in our opinion, those mutual relations which characterize through routes. Indeed, it is not perceived that their customary conduct of such business leaves anything to be done — and nothing was suggested in answer to inquiry on the argument of the case as to what could be done — to create the conditions which constitute through routes. Apparently they are doing for and with each other in respect of through traffic practically everything that the Commission could require under its present power to establish through routes where connecting carriers have failed or neglected to provide such facilities.

The sixth section of the act recognizes three kinds or classes of rates, namely: the rates between different points on each

carrier's line; the joint rates of two or more carriers when they have established through routes and joint rates; and the "separately established rates" applied by a carrier on through traffic when there is a through route but no joint rate. This rate in question from Pueblo to Leadville seems to us clearly of the latter class. It is the rate which petitioner provided for through transportation, and it was that rate, provided and used for that purpose, of which complaint was made as resulting in an excessive through charge, and which the Commission by its order reduced. The circumstance that it was the same in amount as the purely local rate of petitioner between the same points does not alter its character as a separately established rate applicable to through shipments. In our opinion both the carrier and the traffic were within the terms of the act, and the Commission had full jurisdiction to make the order in question. See *Interstate Com. Com. v. Chicago, R. I. & Pac. Ry.* (218 U. S., 88), where the Supreme Court sustained an order of the commission which reduced the local rates of certain carriers between the Mississippi and Missouri Rivers when applied to through traffic from eastern territory.

We do not say that a carrier located wholly within a State may not so conduct its business as to be in fact and in law a purely intrastate carrier, nor do we attempt to point out what such a carrier must do or not do to escape regulation under the act. It is sufficient to hold that the petitioner in this case, upon the undisputed and conceded facts, is subject to the provisions of the regulating statute as to the traffic and transportation here in question; and it follows, since no other ground of relief is presented by the record, that *the petition should be dismissed, and it will be so ordered.*

ARMOUR PACKING COMPANY v. UNITED STATES.

SWIFT AND COMPANY v. SAME.

MORRIS AND COMPANY v. SAME.

CUDAHY PACKING COMPANY v. SAME.

200 U. S. 56 (1908).

The facts are stated in the opinion.

Mr. Frank Hagerman and *Mr. J. C. Cowin*, with whom *Mr. A. R. Urion*, *Mr. Henry Veeder* and *Mr. M. W. Borders* were on the brief, for petitioners.

The Attorney General, *Mr. Milton D. Purdy*, Assistant to the Attorney General, and *Mr. A. S. Van Valkenburgh*, United States Attorney, for the United States.

MR. JUSTICE DAY delivered the opinion of the court.

These cases are here upon writs of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. By stipulation there was a single petition for certiorari and the cases in the Circuit Court of Appeals were considered together on the record in the *Armour Packing Company case*, and, as it is conceded in the brief of the learned counsel for the petitioners that the differences in the cases are unsubstantial, the same course may be followed here.

Each of the petitioners was convicted in the District Court of the United States, Western District of Missouri, for violation of the so-called Elkins Act of February 19, 1903, chap. 708, 32 Stat. 847, in obtaining from the Chicago, Burlington and Quincy Railway Company an unlawful concession of 12 cents per 100 pounds from the published and filed rate on that portion of the route between the Mississippi River and New York for transportation upon a shipment made August 17, 1905, for carriage by rail of certain packing house products from Kansas City, Kansas, to New York for export. Upon writs of error from the Circuit Court of Appeals of the Eighth Circuit the sentences of conviction were affirmed. 153 Fed. Rep. 1. . . .

It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an

interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original Interstate Commerce Act, and that its terms do not include such shipments. Analyzing the first section of the act (24 Stat. 379), it is said that it applies to the following kinds of commerce: (a) interstate commerce; (b) commerce between the United States and an *adjacent* foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point of transshipment; (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign country. And, it is contended, that § 6, as amended (25 Stat. 855), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of wholly domestic commerce in the last clause of section one of the original act of 1887, and in the declaration of the scope and purpose of the act declared in its title. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 211. There is no attempt in the language of the act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading. Take the present case. The through rate is obtained by adding the ocean rate to the inland rate. There is no contractual relation between the railroad carrier and the ocean carrier. The ocean rate is uncertain and variable, depending upon time of sailing and available space. The accommodation for ocean shipment was obtained by the shipper and by it made known to the inland carrier. We think the language of the statute, read in the light of the manifest purpose of its passage, shows the intent of Congress to bring interstate commerce within the control of the provisions of the law up to

the time of ocean shipment. This construction is reinforced by the broad provisions of § 6 of the act as to publishing schedules, showing rates, fares and charges, and filing the same with the Interstate Commerce Commission. That such rates, notwithstanding through bills of lading, were subject to the provisions of the act, was held, upon full consideration, and rightfully, as we think, by the Interstate Commerce Commission. *Re Tariffs v. Export and Import Traffic*, 10 I. C. C. Rep. 55.

It is contended that the act, as construed by the Circuit Court of Appeals, makes it conflict with Art. I, § 9, par. 5, of the Constitution, which provides: "No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another."

The petitioner contends that to permit a statute to have such application to articles intended for foreign export is to place a burden on the exercise of this right, because before the shipper can lawfully send his goods abroad and before the carrier can lawfully accept them there must be a compliance with the established rate on file with the Interstate Commerce Commission. This rate is subject only to be changed as provided by law; and this can be done without notice to the exporter and regardless of his power to comply with the legal rate and meet the competition at the seaport and the conditions of foreign markets. These things, it is said, place a distinct burden upon export trade, and therefore come within the constitutional prohibition. But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and unless the alleged interference amounts to such taxation or duty it does not come within the constitutional prohibition. *Cornell v. Coyne*, 192 U. S. 418.

The regulations of interstate commerce provided by the statute now under consideration are within the acknowledged power of Congress under the interstate commerce clause of the Constitution. There is no attempt to levy duties on goods to be exported, and the mere incidental effect in the legal regulation of interstate commerce upon such exportations does not come within this constitutional prohibition.

Nor do we think there is any more force in the contention that this legislation amounts to a preference of ports of one State over those of another within the meaning of the constitutional provision under consideration. This provision was intended to pre-

vent legislation intended to give and having the effect of giving preference to the ports of one State over those of another State. It may be true that the regulation of interstate commerce by rail has the effect to give an advantage to commerce wholly by water and to ports which can be reached by means of inland navigation, but these are natural advantages and are not created by statutory law. The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another cannot be construed as a violation of this constitutional provision. *South Carolina v. Georgia*, 93 U. S. 4, 13; *Pennsylvania v. Wheeling & Belmont Bridge Company*, 18 How. 421, 433. . . .¹

INTERSTATE COMMERCE COMMISSION *v.* UNITED
STATES OF AMERICA *EX REL.* HUMBOLDT
STEAMSHIP COMPANY.

224 U. S. 474 (1912).

The facts are stated in the opinion.

Mr. P. J. Farrell for plaintiff in error.

Mr. Charles D. Drayton, with whom *Mr. John B. Daish* and *Mr. James Wickersham* were on the brief, for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of court.

The ultimate question in the case is whether Alaska is a Territory of the United States within the meaning of the Interstate Commerce Act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, 19 I. C. C. Rep. 81.

The steamship company instituted an action in the Supreme

¹ See *So. Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 525-7. — Ed.

Court of the District of Columbia praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned, hereinafter specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other Territory, and over those carriers operating between the State of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The Court of Appeals, to which court the case was taken by the steamship company, entertained the same view of the Interstate Commerce Act as that expressed by the Supreme Court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the Supreme Court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission requiring it to take jurisdiction of said cause and proceed therein as by law required." To this ruling the Interstate Commerce Commission prosecutes this writ of error.

The proceedings before the Commission were instituted by the steamship company filing a petition (No. 2578) against the White Pass & Yukon Route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, to require said companies to file with the Commission, in the form prescribed by the Act to Regulate Commerce, and to print and keep open for public inspection, schedules showing their rates and charges for transportation of passengers and property between points in Alaska and points in the Dominion of Canada and other places; to establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the State of Washington; to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines; and to cease and desist from preventing by sundry devices the carriage of freights

from being continuous from place of shipment to place of destination when such freight is originated or in any wise handled by the Humboldt Steamship Company.

The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was "without jurisdiction to make the order sought by complainant," resting its ruling upon the authority of its decision in *Matter of Jurisdiction Over Rail and Water Carriers Operating in Alaska*, *supra*.

Section 1 of the Interstate Commerce Act provides that the provisions of the act "shall apply to any . . . common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, . . . or from any place in the United States through a foreign country to any other place in the United States. . . ." 34 Stat. 584.

The pivotal words are: "From one State or Territory of the United States . . . to any other State or Territory, . . . or from one place in a Territory to another place in the same Territory," "Territory" being the especially significant word.

If we may venture to reduce to a single proposition an elaborate discussion of elements and considerations, we may say that the Commission gave to the word "territory" the signification of "organized territory," the chief and determining feature of which is a local legislature as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed.

To this signification and distinction the arguments of counsel are addressed, and much of the reasoning of the lower courts. That field, however, has been traversed by cases in this court, and it need not again be passed over. We may accept and apply the conclusions which have been reached and expressed.

In the case of *Steamer Coquillam v. United States*, 163 U. S. 346, the relation of the courts of Alaska to the Federal judicial system and the applicability of certain statutes concerning the same

were decided, after a review of those statutes and those defining the status of Alaska.

By the fifteenth section of the act of March 3, 1891, creating the Circuit Court of Appeals, it is provided that the Circuit Court of Appeals, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act, shall have "the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district courts and circuit courts; and for that purpose the several Territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits." 26 Stat. 826, 830, c. 517.

In execution of the duty imposed by that section, this court, by an order promulgated May 11, 1891, assigned Alaska to the Ninth Judicial Circuit.

Subsequent to this order the United States brought a suit in admiralty in the District Court of Alaska for the forfeiture of the steamer *Coquitlam* because of an alleged violation of the revenue laws. A decree was rendered for the United States and an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. The United States disputed the jurisdiction of the court on the grounds: (1) that the District Court of Alaska was not a district court within the meaning of the sixth section of the Circuit Court of Appeals Act; and (2) that the District Court of Alaska was not a Supreme Court of a Territory within the meaning of that act and the order of this court assigning Alaska to the Ninth Circuit.

The court certified the questions to this court. We answered the first in the negative and the second in the affirmative. We said, through Mr. Justice Harlan, that the Circuit Court of Appeals Act was necessarily interpreted by this court as conferring appellate jurisdiction upon the Circuit Court of Appeals when by the "order of May 11, 1891, 139 U. S. 707, Alaska was assigned to the Ninth Circuit." And it was further said (p. 352): "Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 (providing for a civil government for Alaska) is the court of last resort within the limits of that Territory. . . . No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by

Congress that does not apply with full force to the Territory of Alaska, in which the court of last resort is designated as the District Court of Alaska. The title of the territorial court is not so material as its character."

The case needs no comment. It clearly defines the relation of Alaska to the rest of the United States. It was not a description of a definite area of land or "landed possession," but of a political unit, governing and being governed as such.

This view is reinforced by other cases. In *Binns v. United States*, 194 U. S. 486, 490, 491, we said, through Mr. Justice Brewer, that we had held in *Steamer Coquillam v. United States* that "Alaska is one of the Territories of the United States." And also: "Nor can it be doubted that it is an organized Territory, for the act of May 17, 1884, 23 Stat. 24, entitled 'An act providing a civil government for Alaska,' provided: That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall constitute a civil and judicial district, the government of which shall be organized and administered as hereinafter provided."

In *Binns v. United States* the fact of a local legislature, or indeed any special form of government, was not considered as necessarily a feature of an organized Territory. "It must be remembered," it was said, "that Congress in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories." There is much more in that case which might be quoted as establishing that the status of Alaska is that of an organized Territory. See also *Rasmussen v. United States*, 197 U. S. 516.

It is contended further by the Commission that railways were first authorized to be constructed in Alaska by the act passed May 14, 1898, 30 Stat. 409, c. 299, and that § 2 of the act provided as follows:

"That all charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior."

The argument is that this provision brings into force § 6 of the

Interstate Commerce Act, and that, it is said, "under familiar rules of construction, excludes the application of every other section in the act," and that, besides, the provision that the rates on the Alaskan railroads should be subject to revision and modification by the Secretary of the Interior "negatived the jurisdiction of the Interstate Commerce Commission, even if Alaska was apprehended to be within section 1 of the Interstate Commerce Act."

These contentions do not seem to have been made in either the Supreme Court of the District or in the Court of Appeals. It was referred to very briefly as a circumstance to be considered in a majority report of the Interstate Commerce Commission in the ruling case, and more at length in the minority report. In the latter report important circumstances were pointed out. The Interstate Commerce law preceded that which gave authority to the Secretary of the Interior to revise and modify railroad rates, and the authority was confined to that special exercise, and, so far, it may be said to have amended the Interstate Commerce Act. At that time it had been held in the *Maximum Rate Cases* (162 U. S. 184; 167 U. S. 479, and 168 U. S. 144), that Congress had not conferred upon the Interstate Commerce Commission the legislative power to prescribe rates, either maximum, minimum or absolute. The power to prescribe a rate was conferred by the amendment of June 29, 1906, and that amendment extended the provisions of the act for the first time to intraterritorial commerce. The amendment made the act completely comprehensive of the whole subject and entirely superseded the minor authority which had been conferred upon the Secretary of the Interior. As said by the minority of the Commission: "There is no suggestion of doubt that the ends of justice require as much the application of the same principle and regulation in Alaska as in New Mexico or Arizona." The two latter at the time this was said were Territories.

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity to require it or him to proceed, the manner of doing so being left to its or his discretion. It is true there may be a jurisdiction to determine

the possession of jurisdiction. *Ex parte Harding*, 219 U. S. 363. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise *quasi* judicial duties, but its functions are defined and, in the main, explicitly directed by the act creating it. It may act of its own motion in certain instances — it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refused to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed? The answer of the Commission is, by "a reversal by the tribunal of appeal." And such a tribunal, it is intimated, is the United States Commerce Court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the Commerce Court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an applicant was not entitled to relief. This is so because the action of the Commission refusing to entertain a petition on the ground that its subject-matter was not within the scope of the powers conferred upon it, would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand.

In the case at bar the Commission refused to proceed at all, through the law required it to do so; and to so do as required — that is, to take jurisdiction, not in what manner to exercise it — is the effect of the decree of the Court of Appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in *In the Matter of Jurisdiction*

Over Rail and Water Carriers Operating in Alaska, 19 I. C. C. Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

*Judgment affirmed.*¹

UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, v. UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

CHICAGO JUNCTION RAILWAY COMPANY v.
UNITED STATES.

APPEALS FROM THE UNITED STATES COMMERCE COURT.

226 U. S. 286 (1912).

Mr. Assistant Attorney General Adkins and Mr. William E. Lamb, Special Assistant to the Attorney General, for the United States, appellant in No. 621 and appellee in No. 622.

Mr. Ralph M. Shaw for appellees in No. 621 and appellant in No. 622.

Mr. Willard M. McEwen and Mr. Joseph Weissenbach filed a brief for appellees, *Louis Pfälzer & Sons*.

MR. JUSTICE DAY delivered the opinion of the court.

These are appeals from a decree entered by the Commerce Court in an action begun by the United States on the application of the Attorney General at the request of the Interstate Commerce Commission against the Union Stock Yard and Transit Company of Chicago, an Illinois corporation (hereinafter called the "Stock Yard Company"), the Chicago Junction Railway Company, an Illinois corporation (hereinafter called the "Junction Company"), and the Chicago Junction Railways and Union Stock Yards Company, a New Jersey corporation (hereinafter

¹ See *American R. R. Co. of Porto Rico v. Didricksen*, 227 U. S. 145, extending the Safety Appliance Act to Porto Rico in connection with *Porto Rico v. Rosaly*, 227 U. S. 270, as to the applicability of the Interstate Commerce Act to Porto Rico. — Ed.

called the "Investment Company"), and David Pfälzer, Abe Pfälzer and Jones L. Pfälzer, a copartnership doing business under the firm name and style of Louis Pfälzer & Sons. The bill sought to enjoin violations of §§ 2, 6 and 20 of the Interstate Commerce Act, as amended 24 Stat. 379, c. 104; 34 Stat. 584; 36 Stat. 539, c. 309 and of § 1 of the Elkins Law as amended 34 Stat. 584, c. 3591. Its prayer was that an injunction should issue to restrain the Stock Yard Company and the Junction Company from further engaging in interstate commerce until they had filed tariffs as required by § 6 of the act and to restrain the performance of a certain contract with the Pfälzers, and that the Stock Yard Company and the Junction Company be required to file the statements and reports provided by § 20 of the act. The Commerce Court held that neither the Stock Yard Company nor the Investment Company was a common carrier, and that it had no jurisdiction to determine whether the contract would amount to an unlawful discrimination or advantage, or rebate, and dismissed the bill as to the Stock Yard Company and the Investment Company and as to the Pfälzers. As to the Junction Company, it held that it was a common carrier subject to the Interstate Commerce Act and obliged to file its tariffs as required by the statute. It further held that, since there was no allegation in the bill that the Interstate Commerce Commission had by general or special order required the Stock Yard Company or the Junction Company to file statements and reports under § 20, it could not issue mandamus to make such statements and reports. 192 Fed. Rep. 330:

The Government appealed from the dismissal of the bill as to the Stock Yard Company, the Investment Company and the Pfälzers, which is case No. 621. It, however, makes no contention against the holding of the Commerce Court as to the construction of § 20. The Junction Company appealed from the decision of the Commerce Court as to it, which appeal is case No. 622.

The correctness of the decision and decree of the Commerce Court is submitted upon facts which are practically undisputed. The Stock Yard Company was incorporated under a special act of the legislature of Illinois, February 13, 1865; Laws 1865, v. 2, p. 678, which authorized it to locate, construct and maintain near the southerly limits of the City of Chicago:

" . . . All the necessary yards, inclosures, buildings, structures, and railway lines, tracks, switches, and turn-outs, aqueducts,

for the reception, safe-keeping, feeding, and watering, and for the weighing, delivery, and transfer of cattle and live stock of every description, and also dead and undressed animals that may be at or passing through or near the city of Chicago, and for the accommodation of the business of a general union stock yard for cattle and live stock, including the erection and establishment of one or more hotel buildings, and the right to use the same; . . . to make advances of money upon such cattle and live stock, for freight or other purposes, as may become expedient. . . ."

The charter further provided:

"That said company shall construct a railway, with one or more tracks, as may be expedient, from the grounds which may be selected for its said yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the city on the south between the lake shore and the southwest corner of said city, . . . and to make connections with such suitable sidetracks, switches, and connections as to enable all of the trains running upon said railroads easily and conveniently to approach the grounds selected for said yards, and may make such arrangements or contracts with such railroad companies, or either of them, for the use of any part or portion of the track or tracks of such company or companies which now is or hereafter may be constructed, for the purposes aforesaid, as may be agreed upon between the parties; . . . and to transport and allow to be transported thereon between said railroads and cattle yards, all cattle and live stock and persons accompanying the same to and from said yards, and may also transport and allow to be transported between the railroads entering said city, . . . freight and property of every kind as well as stock and cattle. . . ."

After its creation it acquired real estate, constructed and operated stock yards, with a stock market, built a hotel for the accommodation of its patrons, and constructed in the stock yards district about 300 miles of railroad track consisting of main lines connecting with the trunk lines entering Chicago and a large number of switches to the various industries which had been established adjacent to such tracks.

Prior to December 15, 1897, the Stock Yard Company carried on the stock yards and railroad business, and, although it had regular charges for the services it performed, it filed no tariffs with the Interstate Commerce Commission and concurred in none. On December 15, 1897, the Stock Yard Company leased all of its

railroad tracks and equipment for a term of fifty years to a corporation known as the Chicago and Indiana State Line Company (hereinafter called the "State Line Company"), retaining for itself the loading and unloading platforms and facilities used in connection with its stock yards business. This lease covered all its railroad and railroad tracks, switches, etc.; roundhouse, repair shops, machine shops, coal chutes, etc., then in existence or theretofore used by the Stock Yard Company in connection with its railroad; and all and singular the equipment and the telegraph lines, instruments and appurtenances owned or possessed by the Stock Yard Company and used by it in conducting its railroad business. By the terms of the lease the State Line Company was given the right in the future to maintain and operate upon the lands of the Stock Yard Company additional side tracks and switch tracks and other appurtenances necessary to reach industrial plants.

Afterwards the State Line Company consolidated with the Chicago, Hammond & Western Railroad Company, and the consolidated company became known as the Chicago Junction Railway Company (defendant herein) and, in addition to the railroad leased from the Stock Yard Company, operated a belt line around the City of Chicago. In November, 1907, the Junction Company sold the belt line to the East Chicago Belt Railroad Company, retaining the tracks which had been leased by the Stock Yard Company. The equipment operated by the Junction Company, consisting of locomotives and rolling stock, is owned by the Stock Yard Company, but the Junction Company employs its own engineers and crews.

The tracks of the Junction Company are frequently used by the trunk lines to connect the eastern and western systems and to deliver shipments originating without the State to the platforms of the Stock Yard Company, for which service they pay the Junction Company a trackage charge of a fixed sum per car. Large numbers of carload lots of dead freight from points without the State are placed on the receiving tracks of the Junction Company bearing transfer cards showing the destination of the cars, and the Junction Company delivers the cars either to the consignee, if situated on its tracks, or to the receiving track of the forwarding carrier. It is paid by the trunk lines a fixed charge for this service, which the latter absorb. The Junction Company upon the order of the trunk lines places cars for loading by shippers in the stock yards district and after they are loaded hauls them to the

receiving tracks of the trunk lines, and it receives from the trunk lines a fixed amount for this service, which is absorbed by the latter. Less than carload lot freight is delivered at the freight depot known as the Union Freight Station and placed in cars by the Junction Company which transports them to the receiving tracks of trunk lines, and for this service the trunk lines pay the Junction Company five cents per hundred weight. Sometimes such freight is hauled from the industries in the stock yards district to the Union Freight Station by the Junction Company and distributed in the cars. The Junction Company receipts for the less than carload lot freight in the name of the trunk lines, such receipts being exchangeable for bills of lading at the office of the trunk lines, and all charges paid to the Junction Company are receipted for in the name of the trunk lines and remitted to them. The Junction Company has an arrangement with the Baltimore & Ohio Railroad Company whereby it performs a like service for such company as to the less than carload lot freight brought by it to the Union Freight Station and destined to points beyond the State. Shipments of horses are transported by the trunk lines to the loading platforms of the Stock Yard Company and there picked up by the Junction Company and hauled to the unloading chutes for horses, and the Junction Company receives, besides the trackage charge, a certain amount per car for this service. A large part of the service thus performed by the Junction Company is in connection with interstate shipments. The Junction Company does not issue any bills of lading with respect to any kind of freight.

After leasing its railroad property to the Junction Company, the Stock Yard Company continued to operate its stock yard facilities for loading and unloading cattle and other live stock bound for and coming from points outside the State, and to feed and water live stock in transit over the lines of trunk line carriers, and also to feed, bed and water live stock shipped to consignees doing business in the stock yards district.

The employes of trunk lines bringing live stock to the stock yards turn over the waybills accompanying such shipments, with what are called "live stock stubs" attached, to the employes of the Stock Yard Company, who use the waybills in unloading and counting the stock, and the waybills and stubs are then sent to the auditor of the Stock Yard Company (being also the auditor of the Junction Company) who retains the stubs and forwards the waybills to the local agents of the trunk lines. The Stock Yard

Company advances the charges on such shipments to the trunk lines and collects from the consignees, usually commission men doing business at the stock yards, the moneys it has so advanced for their accommodation.

The Junction Company publishes tariffs showing the charges which it exacts for its services, such tariffs being in general circulation in Chicago, especially about the stock yards district, but they were not filed with the Interstate Commerce Commission. Prior to 1907, the Junction Company, while owning railroad facilities in Indiana, had filed tariffs with the Interstate Commerce Commission, but upon the sale of such properties cancelled the tariffs. It was the belief of the Government and of the Junction Company that all tariffs and concurrences had been cancelled, but it is shown by a stipulation which the parties have filed that since the issues were made up it has been discovered that one particular concurrence through inadvertence was not cancelled.

The Investment Company is a holding company and owns over ninety per cent. of the shares of the Stock Yard Company and practically all of the shares of the Junction Company.

As to the contract with the Pfälzers: They were members of a copartnership (since incorporated) engaged in the slaughtering business, their plant being located in the vicinity of the tracks operated by the Junction Company and the cattle pens of the Stock Yard Company. They purchased cattle from time to time outside the City of Chicago and in States other than Illinois and shipped them to the partnership at the stock yards, where they were handled as hereinbefore stated for delivery to the consignee. The freight charges on such business averaged for the five years prior to the filing of the Pfälzers' answer about \$2,800 annually. The amount of freight consigned to the Pfälzers tends to increase the business of the Stock Yard Company and the Junction Company and therefore the revenue of each.

In 1906 the Department of Agriculture required the Pfälzers to make changes in their plant; in 1908 it directed them to erect a new plant, and in 1909 they were notified that the Government would deny to them further inspection of the products of their plant. They then proposed to locate in Kansas City, Missouri, but upon negotiation with the Stock Yard Company made the contract under consideration here. This contract provided that upon the erection by the Pfälzers of a modern slaughtering, packing and canning plant adjacent to the stock yards in Chicago,

costing a certain sum and having a required capacity, the Stock Yard Company would pay them \$50,000, and the Pfälzers agreed that all live stock slaughtered or canned by them within a radius of 200 miles would either be purchased at such stock yards or pass through and use them, the customary yardage, tolls and charges to be paid thereon, or that the Pfälzers would pay full tolls and charges on live stock the same as if it had been sent to the stock yards for sale and had there been bought by them; and that for fifteen years they would conduct all their slaughtering, packing and canning business at such plant and not interest themselves directly or indirectly in any other plant or in any other stock yards. The Investment Company guaranteed the performance of the contract by the Stock Yard Company.

It is stated in the answer of the Stock Yard Company and stands admitted in the case that there are other competitive stock yards in the United States which have built up their business in competition with it by offering and giving inducements, either in the shape of land or money, to packing houses and other industries to locate at or near their yards.

From this statement it is apparent that the Stock Yard Company was organized for the purpose of maintaining a stock yard, with the usual facilities of such yards as to loading and unloading and caring for freight, and it was authorized to and did own and operate a railroad system, transporting cars to and from trunk lines in the course of their transportation from beyond the State and to points outside of the State. This service, so far as the railroad and its operation is concerned, is now performed by the Junction Company. The Stock Yard Company still continues to perform the customary stock yard operations, but by means of the lease to the Junction Company it has divested itself of the operation of the railroad system which it was authorized by its charter to construct and operate and which for many years before the lease it did in fact operate. The Stock Yard Company, under the lease, still gets, however, two-thirds of the profits received by the Junction Company for performing the service in connection with the railroad transportation. This joint service now takes the place of the single service formerly rendered by the Stock Yard Company. The stock of both these companies is held in common ownership by the Investment Company, and it appears that the Investment Company guarantees the contracts, or at least some of them, of the Stock Yard Company.

In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the Act to Regulate Commerce and bound to conform to its requirements?

The Interstate Commerce Act, as amended by the Hepburn Act, 34 Stat. 584, c. 3591, § 1, applies to common carriers engaged in the transportation of persons or property from State to State wholly by railroad, and the term railroad is defined to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property"; and transportation is defined to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. "The transportation of live stock," said this court in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 136, in treating of the duties of common carriers, irrespective of the Act to Regulate Commerce, "begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee." In this connection see *Coe v. Errol*, 116 U. S. 517; *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498.

The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, *supra*, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service. *Southern Pacific*

Terminal Co. v. Interstate Commerce Commission, supra; Ohio R. R. Comm. v. Worthington, 225 U. S. 101.

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier, or receive it while it is still in progress in interstate commerce upon a through rate which includes the terminal services rendered by the two companies, and complete its delivery to the consignee. They are common carriers because they are made such by the terms of their charters, hold themselves out as such and constantly act in that capacity, and because they are so treated by the great railroad systems which use them. In *Union Stock Yards Co. v. United States*, 169 Fed. Rep. 404, Mr. Justice Van Devanter (while a Circuit Judge), speaking for the Court of Appeals, said (406):

"Its [the Stock Yards Company's] operations . . . include the maintenance and use of railroad tracks and locomotives, the employment of a corps of operatives in that connection, and the carriage for hire over its tracks of all live stock destined to or from the sheds or pens, which, in effect, are the depot of the railroad companies for the delivery and receipt of shipments of live stock at South Omaha. The carriage of these shipments from the transfer track to the sheds or pens and vice versa is no less a part of their transit between their points of origin and destination than is their carriage over any other portion of the route. True, there is a temporary stoppage of the loaded cars at the transfer track, but that is merely incidental, and does not break the continuity of the transit any more than does the usual transfer of such cars from one carrier to another at a connecting point. And it is of little significance that the stock-yards company does not hold itself out as ready or willing generally to carry live stock for the public, for all the railroad companies at South Omaha do so hold themselves out, and it stands ready and willing to conduct, and actually does conduct, for hire a part of the transportation of every live stock shipment which they accept for carriage to or from that point, including such shipments as are interstate."

We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company,

are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State. In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the Interstate Commerce Acts.¹

TAP LINE CASES.²

234 U. S. 1 (1914).

THESE are all appeals from decrees of the United States Commerce Court (209 Fed. Rep. 244), annulling orders of the Interstate Commerce Commission refusing in whole or in part to compel certain common carriers which had filed schedules cancelling former schedules covering through routes and joint rates with the Louisiana & Pacific Railway Company, the Woodworth & Louisiana Central Railway Company, the Mansfield Railway &

¹ The remainder of opinion deals with the legality of the Pfälzer contracts. — Ed.

² Docket titles of the Tap Line Cases are: No. 829. United States and Interstate Commerce Commission *v.* Louisiana & Pacific Railway Co.; No. 830. Atchison, Topeka & Santa Fe Railway Co. *v.* Louisiana & Pacific Railway Co.; No. 831. United States and Interstate Commerce Commission *v.* Woodworth & Louisiana Central Railway Co.; No. 832. Atchison, Topeka & Santa Fe Railway Co. *v.* Woodworth & Louisiana Central Railway Co.; No. 833. United States and Interstate Commerce Commission *v.* Mansfield Railway & Transportation Co.; No. 834. Atchison, Topeka and Santa Fe Railway Co. *v.* Mansfield Railway & Transportation Co.; No. 835. United States and Interstate Commerce Commission *v.* Victoria, Fisher & Western Railroad Co.; No. 836. Atchison, Topeka & Santa Fe Railway Co. *v.* Victoria, Fisher & Western Railroad Co.

Transportation Company and the Victoria, Fisher & Western Railroad Company, appellees, hereinafter referred to as tap lines, to establish or reestablish through routes and joint rates and to grant allowances and divisions to the tap lines.

The Commission, after an extensive investigation of the tap lines in the lumber regions, particularly in the States of Arkansas, Missouri, Louisiana and Texas, on April 23, and May 14, 1912, filed its report and supplemental report (23 I. C. C. 277, 549). The report deals at some length with the manner in which logs and lumber are moved in that territory and the practices attending such traffic. The Commission found the identification of the road with the industry, the necessity of incorporation to secure divisions and allowances, the great amount in the aggregate paid by the trunk lines to the tap lines, and the resulting discrimination, the fact that allowances were dependent upon the bargain the tap lines might exact from the trunk lines for a proportion of their traffic and not upon the amount of service rendered, and the fact that most of the lumber mills were near public carriers and that the tap lines would not be kept in operation if the mills were removed. General principles for determining the character of carriers were set forth, and the conclusion stated that the real relation of a tap line was a question to be decided upon the facts in each case.

The Commission entered upon a particular examination of the various lines under investigation, among others, the appellees in these appeals. It found:

The Louisiana & Pacific Railway Company, controlled by the R. A. Long interests, owning a controlling interest in the Hudson River Lumber Company, the King-Ryder Lumber Company, Longville Lumber Company and the Calcasieu Long Leaf Lumber Company, consists of the following tracks, all of which were originally constructed as private logging roads: (1) a track from De Ridder Junction, Louisiana (all of the lines involved in these cases are within that State), to Bundicks, a distance of eight miles. The mill of the Hudson River Lumber Company in whose interest this track is operated is located at De Ridder within a few hundred feet of the trunk lines; Bundicks is apparently a logging camp with a company store. (2) A track from Lilly Junction to Walla, about seven and one-half miles, the latter being a point in the woods where the King-Ryder Lumber Company has a commissary and where is located a small independent yellow-pine mill, owned by the Bundick Creek Lumber Company. The mill of the King-

Ryder Company is at Bon Ami, a town of 2,000, located on the Lake Charles & Northern Railroad Company a short distance from and connected by it with Lilly Junction. (3) A track of two miles at Longville, a town of 2,000 people, where the Longville Lumber Company has its mill and a store, and where also are several independent stores. (4) A track of nine miles from Fayette to Camp Curtis, a place of 200 population, where the Calcasieu Long Leaf Lumber Company has a store, its mill being at Lake Charles. (5) A track of one mile from Bridge Junction to Lake Charles station. The towns De Ridder, Bon Ami, Lilly Junction, Longville, Fayette and Lake Charles are connected by The Lake Charles & Northern Railroad, a Southern Pacific Railway Company line, originally built by the Long interests as a part of the Louisiana & Pacific, and sold to the Lake Charles & Northern with the reservation of trackage rights advantageous to the Louisiana & Pacific. By means of this arrangement the Louisiana & Pacific connects with the Kansas City Southern and the Santa Fe at De Ridder, with the Frisco at Fulton (a station south of Fayette) and with the Southern Pacific, Iron Mountain and Kansas City Southern at Lake Charles. Its equipment consists of 22 locomotives, 6 cabooses, 41 freight cars and 270 logging cars, and a private car used by its officers, who are connected with the lumber companies, in traveling around the country. The lumber companies have many miles of unincorporated logging tracks connecting with the Louisiana & Pacific at various points. There are a number of other stations on the line, among them Bannister, where the Brown Lumber Company owns a small independent mill.

The operation is this: The lumber companies load the logs and switch them over the logging spurs to connection with the tap line which hauls them to the mill, an average distance of 30 miles, for which no charge is made. The tap line switches the carloads of lumber from the mill at Lake Charles, a distance of three-quarters of a mile, to the Southern Pacific; at De Ridder only a few hundred feet to the trunk lines; from the Lake Charles mill to the Frisco a distance of 18 miles; from the Bon Ami mill to the Southern Pacific at Lake Charles a distance of 40 miles, and from the Longville mill to the Southern Pacific at Lake Charles a distance of 24 miles,—the average haul for the controlling companies being nearly 20 miles. By written agreement 50 % of the lumber must be routed over the Frisco and 40 % over the Southern Pacific, but this is not always done. 243,122 tons of lumber, as against

8,819 tons of merchandise were shipped in 1910, 98 % of the whole tonnage being supplied by the controlling interests. The passenger receipts for 1910 were \$473.77. A logging train runs daily on each branch and there is one "mixed" train, loaded chiefly with logs and lumber, between Lake Charles and De Ridder. The allowances paid by the trunk lines range from $1\frac{1}{2}$ to $5\frac{1}{2}$ c per 100 pounds out of their earnings under the group-lumber rate. The operating revenue for the year ending June 30, 1910, was \$220,-985.94, with operating expenses of \$145,433.69, and there was an accumulated surplus of \$73,581.07 on that date.

The Commission found that no charge was made for hauling the logs to the mills by the tap line and that for the short switching service allowances were made as above stated, and concluded that it regarded the whole arrangement as indefensible and unlawful, and saw no ground upon which any allowance might lawfully be made.

The Woodworth & Louisiana Central Railway Company and the Rapides Lumber Company, situated at Woodworth, are identical in interest. The mill is near the Iron Mountain which has a spur track to the mill, and the tap line has a standard gauge track from the mill to La Moria, about six miles, where it connects with the Southern Pacific Railway, Texas & Pacific Railway and Chicago, Rock Island & Pacific Railway, and a narrow gauge track in the other direction for 18 miles whence spur tracks go into the timber. The equipment consists of 1 standard gauge locomotive, 5 narrow gauge locomotives and 2 standard and 9 narrow gauge cars. The steel in the logging spurs and 4 of the narrow gauge locomotives used by the lumber company on the spurs are owned by the tap line and leased to the lumber company; while the right of way for the narrow gauge track is leased from the lumber company.

The tap line hauls the logs from its terminus to the mill without charge, where they are dumped by the trainmen into the mill pond. The carloads of lumber are switched by the tap line from the planing mill to the place where they are taken by the Iron Mountain, about 25 feet. About 95 % of the lumber goes through La Moria, being switched there by the tap line; the allowances from the Iron Mountain out of through rates being from $1\frac{1}{2}$ to $5\frac{1}{2}$ c per 100 pounds, while from the trunk lines at La Moria from 2 to $5\frac{1}{2}$ c. There are no joint rates except on lumber. For the year ending June 30, 1910, there was 40,707 tons of freight handled for the lumber company and 2,100 tons of outside traffic. It has

no passenger business. Its operations for that year showed a deficit, but there was a surplus from previous years of nearly \$10,000. It files annual reports with the Commission.

The Mansfield Railway & Transportation Company and the Frost-Johnson Lumber Company are identical in interest. The tap line extends from Mansfield to a logging camp in the woods known as Hunter, a distance of about 16 miles and the line which was originally incorporated by the citizens of Mansfield in 1881 consisting of 2 miles of track from the town to a connection with the Texas & Pacific at Mansfield Junction. Later the Mansfield Company acquired the two-mile track and equipment, and the interests controlling it purchased a large amount of timber lands near Mansfield at a point called Oak Hill where a mill was built, and spur tracks were laid into the timber, which were later turned over to the Mansfield Company, with the free privilege reserved to the Lumber Company to operate logging trains between the timber and the mill, which operation is performed by a subsidiary company. The purchase price did not reflect the value of the reservation. There are about 25 miles of unincorporated logging tracks. The tap line also has a connection with the Kansas City Southern. It owns a locomotive, a passenger coach and a box car.

The service performed by the tap line is switching cars between the mill and the Kansas City Southern about three-fourths of a mile, although the mill is within 300 feet of the Kansas City Southern and was formerly connected by a spur track which was abandoned and taken up, and to the Texas & Pacific, a distance of two and one-half miles. The tap line bears the expense of maintaining its tracks extending into the woods.

No other yellow-pine mills are served by the tap line, but there is a hardwood mill adjacent to the Frost-Johnson mill, obtaining a substantial portion of its logs from the latter company or subsidiaries, the price including delivery at the hardwood mill, the logs being hauled by the logging company under its trackage right. Some logs are also obtained from the Texas & Pacific, for the switching of which the hardwood mill pays the tap line \$2.50 a car or less. The tap line maintains joint rates on hardwood as well as yellow-pine.

Practically no traffic other than that in which the Lumber Company is interested moves over the track from Mansfield to Hunter, but a good deal of outside traffic moves over the original two miles from Mansfield to Mansfield Junction. 16,539 tons of miscellaneous freight was handled during the year ending June

30, 1910, most of which passed over the Mansfield Junction branch, and much of which was for the controlling interests or their employés; while during the same time 28,596 tons of lumber were handled, 91.4 per cent. of which was supplied by the Lumber Company. A daily train is operated by the tap line in each direction on regular schedule, handling passengers, mail and express; but in 1910 the passenger revenues were only \$1,209.76, while its freight revenues were \$25,617.19.

The Commission noticed the abandonment of the 300 foot spur track and then the payment of an allowance of 1 to 4c per 100 pounds, and held that it was a mere manipulation of the situation in order to establish an unlawful relation; and also held that since the tap line crosses the right of way of the Texas & Pacific within a short distance, the allowance of a like amount by the Texas & Pacific for switching from the mill to Mansfield and down to the junction was unlawful.

The Victoria, Fisher & Western Railroad Company and the Louisiana Long Leaf Lumber Company have the same stockholders and officers. The tap line extends from Victoria, where it connects with the Texas & Pacific, to Fisher, where it crosses the Kansas City Southern Railway, and then extends to Cain, in all about 31 miles. A part of the track was built some time ago and was acquired by the Lumber Company in 1900. In 1902 the Railroad Company was incorporated and its stock exchanged as a stock dividend for the line. There are about 25 miles of logging spurs and sidetracks. The equipment consists of 5 locomotives, 4 cabooses, 3 box cars, 1 flat car and 105 logging cars. It does not operate any trains on regular schedule. There are two mills owned by the Lumber Company, one about a mile from the junction with the Texas & Pacific and the other about half a mile from the tracks of the Kansas City Southern.

The tap line hauls the logs from the forest to the mill, charging \$1.50 per 1,000 feet, which is supposed to cover only the service performed on the logging spurs and not the haul over the main track. The greater part of the lumber from Fisher is turned over to the Kansas City Southern, involving a one-half mile switch by the tap line, and from Victoria is moved by the tap line one mile to the Texas & Pacific; a small amount of the lumber from each mill is taken by the tap line to the more distant trunk line, but the same divisions are paid. The allowances range from $\frac{1}{2}$ to 4c per 100 pounds, and the joint rates are the same as the rates published from adjacent mills on the trunk lines, except traffic

moving to Texas, for which 1½c per 100 pounds is added to the junction-point rate. No passengers are carried, and of 316,676 tons of freight for the year 1910, over 99 % was furnished by the proprietary company. And the accumulated surplus at the end of June, 1910, was \$13,509.17.

The Commission held that the tap line could not participate as a common carrier in joint rates on the products of the proprietary company, but said that the lumber rate of the trunk lines applied from the adjacent mills and that they might make a reasonable allowance for switching.

The Commission made an order in such matter on May 14, 1912, which it amended on October 30, 1912. The amended order, so far as these appeals are concerned, provided:

"The Commission upon the record finds in the case of the . . . Woodworth & Louisiana Central Railway Company; Mansfield Railway & Transportation Company; Louisiana & Pacific Railway Company; Victoria, Fisher & Western Railroad Company; that the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports," and it ordered that the trunk lines should cease and for two years abstain from making any such allowances to the tap lines named.

The Commission further ordered that if the trunk lines failed by a time stated, to reestablish the through routes and joint rates in effect on April 30, 1912, on traffic other than the products of the mills of certain proprietary companies, among others, the appellees herein, it would upon proper petition enter an order requiring the establishment of such routes and rates or enter upon an inquiry with respect thereto, and further provided that all divisions of joint rates should be submitted to the Commission for approval.

The appellees thereupon by their several petitions filed in the United States Commerce Court sought to have the order of the Commission, so far as applicable to them, enjoined and annulled. The Interstate Commerce Commission, the Atchison, Topeka and

Santa Fe Railway Company, the Gulf, Colorado and Santa Fe Railway Company and the Railroad Commission of Louisiana intervened. The Commerce Court said that the question was whether the Commission had acted arbitrarily and on improper considerations in determining under what circumstances a common carrier tap line would be deemed to be performing a mere plant service for a proprietary company, and held that as the service rendered to the proprietary and non-proprietary mills by the tap lines was the same, and as it was held to be a transportation service by an interstate common carrier as to the non-proprietary mills, it must be held to be a similar service as to the proprietary mills, and concluded that the Commission was without power to prohibit the making of joint rates by the trunk lines and the tap lines and the payment of some division of such rates to the tap lines for their services in hauling logs to and lumber from the proprietary mills, and annulled the order of the Commission in this respect and so far as it applied to the appellees.

The United States and the Interstate Commerce Commission, and the Atchison, Topeka & Santa Fe Railway Company and the Gulf, Colorado and Santa Fe Railway Company entered separate appeals from the decrees of the Commerce Court in the four cases instituted by the appellees.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *The Solicitor General [Davis]*, and *Mr. Karl W. Kirchwey*, Attorney, were on the brief, for the United States.

Mr. Charles W. Needham, with whom *Mr. Joseph W. Folk* was on the brief, for the Interstate Commerce Commission.

Mr. Robert Dunlap and *Mr. James L. Coleman*, with whom *Mr. T. J. Norton* and *Mr. Gardiner Lathrop* were on the brief, for the Atchison, Topeka & Santa Fe Railway Company, and other trunk line railway companies, appellants in Nos. 830, 832, 834 and 836.

Mr. Luther M. Waller and *Mr. H. M. Garwood*, with whom *Mr. W. R. Thurmond* was on the brief, for appellees.

Mr. Wylie M. Barrow, with whom *Mr. Ruffin G. Pleasant*, Attorney General of the State of Louisiana, was on the brief, for the Railroad Commission of Louisiana, intervenor and appellee.

MR. JUSTICE DAY, after making the foregoing statement, delivered the opinion of the court.

A preliminary objection is made to the jurisdiction of the Commerce Court in that the order of the Commission is not re-

viewable because merely of a negative character. The Commerce Court examined this question and in view of the amend order of October 30, 1912, reached the conclusion that the order was affirmative in its nature and of a character permitting of review by proper proceedings in that court under the act giving it jurisdiction in such cases. We find no reason to differ with this conclusion and are of opinion that the Commerce Court had jurisdiction in the case.

It is further insisted upon the authority of *Procter & Gamble Co. v. United States*, 225 U. S. 282, and other cases in this court which have followed that decision, that in the present cases the decision rests upon conclusions of the Commission as to matters of fact only, which are within the sole jurisdiction of that body and not reviewable in the courts. But we shall consider the case upon the findings of fact preceding this opinion, which are identical with those made by the Commission, and test the conclusions reached as matters of law, giving proper consideration to matters of fact which are not in dispute.

The final decree of the Commerce Court vacated and set aside the portion of the Commission's order reading as follows:

"That the tracks and equipment with respect to the industry of the several proprietary companies are plant facilities, and that the service performed therewith for the respective proprietary lumber companies in moving logs to their respective mills and performed therewith in moving the products of the mills to the trunk lines is not a service of transportation by a common carrier railroad, but is a plant service by a plant facility; and that any allowances or divisions out of the rate on account thereof are unlawful and result in undue and unreasonable preferences and unjust discriminations, as found in the said reports;

"3. It is Ordered, That the principal defendants [trunk lines, naming them], be, and they are hereby notified and required to cease and desist, and for a period of two years hereafter, or until otherwise ordered, to abstain from making any such allowances to any of the above named parties to the record in respect of any such above described service."

The question now before this court is the correctness of this decree.

A perusal of the findings and orders of the Commission make it apparent that the grounds of decision upon which it proceeded were two, first, that these roads were mere plant facilities, second, that they were not common carriers as to proprietary traffic.

order
by F.C.C.
Set aside
by Commerce
Court

The Commission held that before incorporation they were plant facilities and that after incorporation they remained such. What the Commission means by plant facilities may be gathered from a consideration of some of its decisions. In *General Electric Co. v. N. Y. C. & H. R. R. R.*, 14 I. C. C. 237, a network of interior switching tracks constructed to meet the necessities of the business were held to be mere plant facilities. The same principle was applied to the internal trackage of large industrial plants in *Solvay Process Company v. Delaware, Lackawanna & Western R. R. Co.*, 14 I. C. C. 246. These systems of internal trackage were not common carriers, and, however extensive, were intended to and did furnish service for the plants which owned and operated them. But a common carrier performing service as such, regulated and operated under competent authority, as observed by Commissioner Prouty in *Kaul Lumber Co. v. Central of Georgia Railway Co.*, 20 I. C. C. 450, 456, is no longer a mere appendage of a mill "but a public institution." It thus becomes apparent that the real question in these cases is the true character of the roads here involved. Are they plant facilities merely or common carriers with rights and obligations as such?

It is insisted that these roads are not carriers because the most of their traffic is in their own logs and lumber and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used, does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it rather than the extent of its business which is the real criterion determinative of its character. This principle has been frequently recognized in the decisions of the courts. We need not cite the many state cases in which it has been so held, in view of the fact that the same principle was laid down in the late case of *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211. In that case the Supreme Court of Wisconsin sustained the extension of a spur track to reach the quarries and lime kilns of a single company as a public use authorizing the exercise of the right of eminent domain, and this court affirmed the judgment. Dealing with the contention that the Wisconsin statute was invalid because it authorized action appropriating property upon the exigency of a private business, this court said (p. 221):

"A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the

products of a particular plant; its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service and are subject to the regulation of public authority. As was said by this court in *Hairston v. Danville & Western Rwy. Co.*, *supra* (p. 608) [208 U. S. 598]: 'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43; *Chicago &c. R. R. Co. v. Porter*, 43 Minnesota, 527; *Ulmer v. Lime Rock R. R. Co.*, 98 Maine, 579; *Railway Company v. Petty*, 57 Arkansas, 359; *Dietrich v. Murdock*, 42 Missouri, 279; *Bedford Quarries Co. v. Chicago &c. R. R. Co.*, 175 Indiana, 303."

The Commission has recognized this principle as applicable to tap lines, for in the *Central Yellow Pine Association v. The Vicksburg, Shreveport & Pacific R. R. Co.*, 10 I. C. C. 193, 199, it said:

"While these logging roads are almost or quite without exception mill propositions at the outset, built exclusively for the purpose of transporting logs to the mill, they soon reach a point where they engage in other business to a greater or less extent. As the length of the road increases, as the lumber is taken off and other operations obtain a foothold along the line, various commodities besides lumber are transported, and this business gradually develops until in several cases what was at first a logging road pure and simple has become a common carrier of miscellaneous freight and passengers. Almost all these lines, even where they are run as private enterprises, do more or less outside transportation, and it would be difficult to draw any line of demarkation between the logging road as such and the logging road which has become a general carrier of freight."

This representation it is contended by the Attorney General of Louisiana, who appears here in behalf of the Louisiana Railroad Commission, intervenor, is aptly descriptive of the growth and development of railroads in that State.

Furthermore, these roads are common carriers when tried by the test of organization for that purpose under competent legis-

lation of the State. They are so treated by the public authorities of the State, who insist in this case that they are such and submit in oral discussion and printed briefs cogent arguments to justify that conclusion. They are engaged in carrying for hire the goods of those who see fit to employ them. They are authorized to exercise the right of eminent domain by the State of their incorporation. They were treated and dealt with as common carriers by connecting systems of other carriers, a circumstance to be noticed in determining their true character. *United States v. Union Stock Yard & Transit Co.*, 226 U. S. 286. They are engaged in transportation as that term is defined in the Commerce Act and described in decisions of this court. *Coe v. Errol*, 116 U. S. 517; *Covington Stock Yds. Co. v. Keith*, 139 U. S. 128; *Southern Pac. Term. Co. v. Interstate Com. Comm.*, 219 U. S. 498; *United States v. Union Stock Yard Co.*, *supra*.

Applying the principles which we have stated as determinative of the character of these roads and without repeating the facts concerning them, they would seem to fill all the requirements of common carriers so employed, unless the grounds upon which they were determined not to be such by the Commission are adequate to that end. The Commission itself as to all shippers other than those controlled by the so-called proprietary companies, treated them as common carriers, for it has ordered the trunk lines to reestablish through routes and joint rates as to such traffic. But says the Government, and it insists that this fact alone might well control the decision, the roads are owned by the persons who also own the timber and mills which they principally serve.

This fact is not shown to be inconsistent with the laws of the State in which they are organized and operated. On the contrary the public authorities of that State are here insisting that these companies are common carriers. Congress has not made it illegal for roads thus owned to operate in interstate commerce. While Congress in enacting the Commodities Clause amending § 1 of the Act to Regulate Commerce (June 29, 1906, c. 3591, 34 Stat. 584) sought to divorce transportation from production and manufacture and to make transportation a business of and by itself unallied with manufacture and production in which a carrier was itself interested, the debates, which may be resorted to for the purpose of ascertaining the situation which prompted this legislation, show that the situation in some of the States as to the logging industry and transportation was sharply brought to the attention of Congress and led to the exemption from the Commo-

dities Clause of timber and the manufactured products thereof, thus indicating the intention to permit a railroad to haul such lumber and products although it owned them itself. And that Congress had the constitutional power to enact such exemption was held in *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 416-7. This declaration of public policy which is now part of the Commerce Act cannot be ignored in interpreting the power and authority of the Commission under the act. The discussion resulting in the action of Congress shows that railroads built and owned by the same persons who own the timber were regarded as essential to the development of the timber regions in the Southwest and the necessity of such roads was dwelt upon and set forth with ample illustration by Commissioner Prouty in his concurring opinion in this case.

As we have said, the Commission by its order herein required the trunk lines to reestablish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves.

* * * * *

Affirmed.

IN THE MATTER OF THE MUNCIE & WESTERN
RAILROAD COMPANY.

30 I. C. C. 434 (1914).

The facts are stated in the report.

Rollin Warner, Arthur W. Brady, and Henry B. F. Macfarland
for Muncie & Western Railroad Company.

M. T. Brady for Indiana State Railroad Commission.

REPORT OF THE COMMISSION.

HARLAN, Chairman:

The discovery about 1888 of natural gas in the vicinity of the city of Muncie, in the state of Indiana, caused some of its citizens to join in an effort to make it an industrial center by directing the attention of manufacturers to this source of cheap and convenient fuel and promising them adequate railway service. One of the first companies attracted to the place was the Ball Brothers' Glass Manufacturing Company, which erected a large plant for the manufacture of fruit jars and similar glassware at a point now called Industry, about 1 mile south of the city. At that time Muncie was served by the Lake Erie & Western, the Big Four, so called, and by the Fort Wayne, Cincinnati & Louisville railroads. The latter was the first company to extend its tracks to the new glass plant and to the few other factories located in that part of the city. These tracks later developed into a general public belt line, known as the Fort Wayne Belt, now a subsidiary of the Lake Erie & Western. Subsequently the Muncie Belt, a subsidiary of the Big Four, also extended its tracks to the glassworks. After some litigation with the Fort Wayne Belt the new switching line was completed and put into operation in 1892.

In 1892 the New York Central lines obtained control over the Lake Erie & Western and the two belt lines thus came under a common management with the result, as said of record, that the efficiency of the switching service was somewhat impaired. Whatever may be the fact in that regard the glass company some 10 years later incorporated, or caused to be incorporated, the Muncie & Western Railroad Company and constructed a track to connect its plant with the rails of the Chesapeake & Ohio. Apparently the intention was to connect the new industries in the south part of the town with all the trunk lines entering Muncie. But after the glass factory had thus been connected up with the Chesapeake

& Ohio, and before the rails of the Muncie & Western were extended to the other industries, the supply of natural gas failed and practically all the factories, except the glass plant, closed down. It is claimed of record that the Muncie & Western, except for this circumstance, would have been extended to other plants; but as a matter of fact the construction work went no further after the glassworks had been connected with the rails of the Chesapeake & Ohio. Later it was connected up with the Pennsylvania lines and still later with the Muncie Belt. In this manner the glass factory was afforded an outlet over all the trunk lines serving Muncie. As finally completed the Muncie & Western has only 2.78 miles of track, of which 1 mile is called main track, the remaining 1.78 miles consisting of yard tracks and sidings located in and around the glass factory. For the right of way and certain tracks within the plant it pays the proprietary glass company a rental of \$5,000 a year. It owns only the 1 mile of track outside the plant. On its rails is a small pottery factory, which is also reached by the tracks of the Fort Wayne Belt Line.

The Muncie & Western has no freight-car equipment and has never even owned a locomotive. When it began operations in 1902 it switched the traffic of the glass plant to and from the trunk lines with a leased locomotive. But it abandoned this in 1905 and entered into an arrangement, which is still in effect, by which the switching operations are performed and the material and labor for maintenance of the tracks are supplied by the Muncie Belt Line. The latter is reimbursed by the Muncie & Western for the actual cost of maintenance, which amounted in 1912 to about \$1,800; it was also reimbursed by the Muncie & Western for the actual operating cost, which for the same period amounted to about \$5,000. As approximately 10,000 cars are handled in and out of the glass plant a year, it will be seen that the cost to the glass company is something less than 75 cents a car. Nevertheless, the Muncie & Western, although it performs no physical operations, receives allowances from the connecting carriers of \$2.50 a car on inbound material and \$3.50 a car on outbound manufactured products. These charges are absorbed by the trunk lines having a line haul on the traffic of the glass company. In other words, the trunk lines pay these sums to this nonoperating plant railway for the privilege of handling traffic into and out of the glassworks.

The Muncie & Western has no outstanding bonds, and its capital of \$50,000 is owned by the stockholders of the glass company,

each stockholder of the latter being also a stockholder in the former. The record indicates that not over \$28,000 in cash has been expended upon the property up to the date of the hearing. This entire amount was furnished to the Muncie & Western by the glass company, and we infer from the record that it has been fully repaid to the stockholders of that company out of the revenues of the plant railway. Its annual report for the year ending June 30, 1912, shows a total revenue of \$23,626, all derived ostensibly from switching operations performed by it, but in reality performed by the Muncie Belt Line at cost. Its expense account for that period amounted to \$11,357.56, leaving it a net operating revenue of \$12,268.44. After the payment of taxes amounting to \$318.49 and after paying to the proprietary company for a right of way within the plant \$5,000, there was left to the plant railway a surplus of \$6,949.95. This amount added to the accumulated surplus of previous years left the company on June 30, 1912, with a total surplus of \$29,516.39.

The record presents a remarkable example of the devices resorted to by industrial companies for exacting allowances from the trunk lines on their own traffic. Here we have a plant railway, representing a total investment of \$28,000, upon which there accrues to the proprietary interests an annual net revenue of nearly 50 per cent, although the plant railway owns neither cars nor locomotives and does not itself turn a wheel.

Upon all the facts disclosed of record the Muncie & Western is shown to be purely a private facility of the Ball Brothers' Glass Manufacturing Company, and we so conclude and find. We further find and conclude that there is no justification for the allowance to it by the connecting trunk lines of a switching charge. These allowances were discontinued on April 1, as we understand the present situation. It may be well to add that the disposition of the case has been deferred by reason of the pendency of the same general questions in *Industrial Railways case*, 29 I. C. C. 212.

CRANE IRON WORKS *v.* UNITED STATES (INTER-
STATE COMMERCE COMMISSION *ET AL.*
INTERVENERS).

UNITED STATES COMMERCE COURT.

209 Fed. Rep. 238 (1912).

The facts are stated in the opinion.

Mr. William A. Glasgow, jr., and *Mr. Cyrus G. Derr*, with whom *Mr. Charles F. Diggs* was on the brief, for the petitioner.

Mr. Winfred T. Denison, Assistant Attorney General, with whom *Mr. Thurlow M. Gordon*, special assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Jackson E. Reynolds for the Central Railroad Company of New Jersey, intervenor.

KNAPP, Presiding Judge:

The petitioner in this case, the Crane Iron Works, instituted proceedings before the Interstate Commerce Commission against the Central Railroad Company of New Jersey and the Crane Railroad Company to procure an order requiring the defendant railroads to establish through routes and joint rates on certain commodities between points on the Crane Railroad and points in the State of New Jersey on the lines of the Central Railroad; and also for reparation on account of previous shipments. After full hearing the Commission made a report (17 I. C. C. Rep., 514) to the effect that petitioner was not entitled to the relief sought, and thereupon entered an order dismissing the proceedings.

Thereafter this suit was brought to set aside and annul the Commission's order of dismissal on grounds which will be hereafter stated. The United States filed a motion to dismiss on the ground that the petition did not state a cause of action, and a like motion to dismiss was filed by the Commission which had intervened. On these motions the case has been argued and submitted.

There had been a previous application to the Commission for the same purpose by the Crane Railroad Company, which the Commission also dismissed, as appears by its report and order therein (15 I. C. C. Rep., 248). Both reports are attached to and made a part of the petition now before us, and from these reports and the petition itself the following facts appear:

The petitioner is a corporation organized under the laws of Pennsylvania and located in the borough of Catasauqua, in that State. It was incorporated about the year 1895 for the purpose of acquiring the plant and property of the Crane Iron Company, which had for many years carried on the business denoted by its name. At that time the plant consisted of three blast furnaces, together with appurtenant buildings, storage bins, etc., and a private railroad connected with the works. It does not appear when this railroad was constructed or when it was extended to connect with exchange tracks of the Central Railroad and other long-line carriers; but it does appear to have been in use for the purposes of the iron plant for more than thirty years.

In the operation of this plant it is necessary to transport loaded cars received by rail to various points within the limits of the plant for unloading, to transport cars which have been loaded with its product from various points within the plant to the line of railway by which they are taken to destination, and also to some extent necessary to move cars from point to point within the plant itself. For these purposes the iron works long ago laid down rails extending from a connection with the Central Railroad to the various points within its plant where cars were to be placed. The line of the Central Railroad extends through the premises of the iron works and the point where the two railroads connect is now and always has been upon the iron works' land. The iron works also provided the necessary locomotives for operating the various tracks which it had built to accommodate the needs of its plant. In actual operation loaded cars destined for the iron works were placed by the Central Railroad upon a track known as the exchange track, from which they were taken by the locomotives of the iron works and hauled to the required point within its plant. When cars were loaded for movement out they were taken by the same locomotives and placed upon the exchange track, where the Central Railroad received and transported them to destination. These locomotives were also used for moving cars from point to point within the plant as might be desired.

For this service the petitioner has never received and, until the organization of the Crane Railroad, had never claimed that it should receive compensation from the Central Railroad. Indeed, it seems to have been assumed that these tracks and engines were a necessary part of the plant of the iron works whose business could not be properly carried on without them.

In process of time a few other industries, perhaps half a dozen,

were located in close proximity to the premises of the iron works, though not upon its land, and these industries were so situated that loaded cars could be transported between the tracks of the Central Railroad and the industry only over the rails of the Crane Iron Works. For the purpose of serving these industries, the Crane Iron Works extended its rails beyond its own land to these several plants. Cars for these industries were placed upon the same track with those intended for the iron works and taken by the locomotives of the iron works over the rails of that company to the several industries. For this service the iron works made a charge to the industry which seems to have been usually two dollars a car. The different railroads bringing these cars to Catsauqua, including the Central Railroad, paid to the iron works towards defraying this charge at first five cents and subsequently six cents per ton. This condition seems to have continued for many years, during which time, as above stated, the iron works neither claimed nor received any compensation for handling its own freight.

Under the statutes of Pennsylvania a private railroad cannot connect with a public railroad except for handling the business of the owners of the private railroad, and the iron works was advised that it had no lawful right to perform this switching service for the other industries. Accordingly, in 1905, the Crane Railroad Company was incorporated, and the tracks and other property used by the iron works in connection with its railroad were conveyed to the Crane Railroad Company, together with a strip of land ten feet wide wherever its rails were laid upon the land of the iron works and also whatever rights of way it might have in reaching the other industries in question. The capital stock of both the Crane Iron Works and the Crane Railroad Company is owned by the Empire Iron & Steel Company, and the management of the Crane Railroad Company after the incorporation continued in the same manner as before, although the operating accounts of the two companies were kept entirely separate.

Although the Crane Railroad Company was organized in 1905 it did not begin business on its own account until the following year, since which time it has charged both to the other industries and to the Crane Iron Works two dollars per car for this switching service, and it is insisted that the various railroads entering Catsauqua should absorb this switching charge. The Central Railroad has declined to make any allowance on account of cars handled for the Crane Iron Works, but has made an allowance

of six cents per ton on traffic consigned to or from the other industries.

The principal contention of petitioner appears to be that the Crane Railroad Company is a common carrier subject to the provisions of the act to regulate commerce and the jurisdiction of the Commission; that this was conclusively established by the evidence before the Commission; that the Commission, in failing to find the fact accordingly and leaving it undetermined, committed an error of law; that as such common carrier the Crane Railroad Company is legally entitled to compensation for the transportation service which it is alleged to perform for petitioner; and that therefore it was error of law for the Commission to refuse the relief which the petitioner sought to secure. Incidentally, and in support of the main contention, it is further claimed that the dismissal order was erroneous because the undisputed evidence established as matter of law unjust discrimination on the part of the Central Railroad of New Jersey, in that it pays the Crane Railroad, out of the tariff charge which it collects, for transporting cars to and from the other industries located on the tracks of the Crane Railroad, but refuses to pay anything for transporting cars to or from the Crane Iron Works.

The Crane Railroad Company is organized under the railroad law of Pennsylvania; which, among other things, declares that all railroads so organized shall be common carriers. In that State it has undoubtedly the legal status of a common carrier, with such privileges and obligations as pertain to railroad corporations in Pennsylvania. It is not necessary to discuss whether the Crane Railroad is in fact a common carrier within the meaning of that term as used in the act to regulate commerce, because we shall assume for the purposes of this case that it is a common carrier subject to the act, and the matters in dispute will be decided on that assumption. . . .

But the dismissal order in question rests upon another basis, which will be briefly considered. Upon all the circumstances connected with the location, construction, and operation of the Crane Railroad, the Commission found as an ultimate fact that, as to the Crane Iron Works, it was a mere plant facility, performing services which the iron works should perform for itself if it desired such services, and that the Central Railroad was under no obligation to pay the Crane Railroad for the switching service which it performs for the iron works and, indeed, could not lawfully do so. We see no reason to doubt the correctness of this

conclusion. The Commission had previously pointed out the distinction between those operations which constitute a plant facility and the legitimate services of a common carrier (*General Electric Company v. N. Y. C. & H. R. R. Co. et al.*, 14 I. C. C. Rep., 237; *Solvay Process Company v. D., L. & W. R. R. Co.*, 14 I. C. C. Rep., 246), and the observations made in these illustrative cases seem to us to express a sound and wholesome principle. That there was substantial evidence to sustain the finding of the Commission as to the character of the services rendered is not open to reasonable question, and, this being so, the conclusion must be accepted accordingly.

But the argument is earnestly pressed that such a relation can not as matter of law be predicted of an incorporated railroad which is declared to be a common carrier by the fundamental law of the State of its creation. In other words, it is insisted that the Crane Railroad, being in law a common carrier and performing the functions of a common carrier, can not be a plant facility of the Crane Iron Works, but must be regarded as a common carrier for the Crane Iron Works, and entitled as a matter of legal right to a just share of the transportation charge which the Central Railroad makes and collects for carrying the traffic of the iron works; and on this theory it is argued that the finding and conclusion of the Commission involve an error of law which this court should correct.

We are constrained to reject this contention. Whether the Crane Railroad is a plant facility as to the Crane Iron Works or a common carrier of the traffic of that concern must be held to be a question of fact which is not affected by the circumstance of incorporation. We understand it to be admitted that the operations of this railroad when it was owned and operated by the iron works were the operations of a plant facility. It is contended, however, when the railroad was separately incorporated and passed from the ownership of the iron works, that its relation to the latter and the legal character of its services became immediately changed. That is to say, the mere fact of the separation of ownership and the transfer of the title and control of the railroad property to a new corporation, although there was not the slightest change in what was actually done, operated in legal effect to transform a plant facility into a common carrier and to impose obligations on the Central Railroad, as to the traffic of the iron works, which it could not theretofore have been required to assume. We can not believe that any such result was ac-

complished. The rights and duties of the Central Railroad respecting the iron works could not thus be altered. If its obligations as a common carrier were fully discharged and its tariff rate earned by delivering cars to and taking them from the exchange tracks before the iron works parted with its railroad, its rights and duties respecting that concern were neither increased nor diminished by the creation of the Crane Railroad. The services rendered to the iron works continuing to be precisely the same in point of fact, this railroad continued to be utilized as the facility of the iron works' plant in the same way after as before incorporation.

Nor do we perceive any serious objection to regarding a given agency as a plant facility of a particular shipper, although a common carrier as to other shippers. Whether considered from the standpoint of law or of practical administration, it seems reasonable to hold, as the Commission virtually held in this case, that a railroad of the kind in question may have this dual character and perform services for one concern which are not the services of a common carrier, but which that concern is bound to provide for itself, notwithstanding it occupies the relation of a common carrier to other concerns and the public generally. Concededly, the work which the Crane Railroad does in moving cars between different points in the iron works' plant has none of the incidents of common carriage, and why may not the same thing be affirmed of the work it does in switching cars for the iron works to and from the exchange track with the Central Railroad, even if the work it does for the other industries makes it as to them or the shippers of Catasauqua a common carrier? . . .

Upon the whole case we are of opinion that no error of law was committed by the Commission in denying the petitioner's application. It follows that *the motions to dismiss the petition should be granted, and it will be so ordered.*

UNITED STATES *v.* ADAMS EXPRESS COMPANY.

229 U. S. 381 (1913).

The facts are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Loring C. Christie* was on the brief, for the United States.

Mr. Joseph S. Graydon, with whom *Mr. Lawrence Maxwell* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment, under the Act to Regulate Commerce, of the Adams Express Company, by that name, alleging it to be 'a joint stock association, organized and existing under and by virtue of the common law of the State of New York.'¹ . . .

The indictment alleges that the Adams Express Company had filed with the Interstate Commerce Commission its schedules of rates and charges, specifies what those charges were in certain cases, and sets forth in different counts instances in which the company demanded and received sums in excess of its schedule rates for the parcels carried — in short, disobeyed the act of February 4, 1887, c. 104, § 6, 24 Stat. 379, 380. By § 10 (amended by act of June 18, 1910, c. 309, § 10, 36 Stat. 539, 549), any common carrier subject to the provisions of the act, wilfully doing this is guilty of a misdemeanor and liable to a fine.

The objection to applying § 10 to the defendant has been indicated. It is confirmed in argument by the citation of many cases in which such companies are treated as simple partnerships, including those in which this court has declined to extend the legal fiction applied in determining jurisdiction over corporations so as to cover them. *Chapman v. Barney*, 129 U. S. 677. *Great Southern Fireproof Hotel Co. v. Jones*, 177 U. S. 449, 454, 456. *Thomas v. Board of Trustees*, 195 U. S. 207. But the argument is met by the plain words of the statute as it now stands. For by § 1 of the original act of 1887, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, "The term 'common carrier' as used in this act shall include express companies and sleeping car companies." And thus the liability of common carriers created by

¹ Here follows a consideration of a jurisdictional point arising under the Criminal Appeals Act of March 2, 1907 (34 Stat. 1246). — Ed.

§ 10 stands as if it read that express companies violating § 6 should be guilty of a misdemeanor and liable to fine.

It has been notorious for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act. As suggested in the argument for the Government, no one, certainly not the defendant, seems to have doubted that the statute now imposes upon them the duty to file schedules of rates. *American Express Co. v. United States*, 212 U. S. 522, 531. (The American Express Company is a joint stock association.) But if it imposes upon them the duties under the words common carrier as interpreted, it is reasonable to suppose that the same words are intended to impose upon them the penalty inflicted on common carriers in case those duties are not performed. It is true that a doubt was raised by the wording of § 10 in the original act, whether corporations were indictable under it. This doubt was met by the act of February 19, 1903, c. 708, § 1, 32 Stat. 847. We do not perceive that any inference can be drawn from this source in favor of a construction of the later amendment other than that we deem the natural one.

The power of Congress hardly is denied. The constitutionality of the statute as against corporations is established, *New York Central & Hudson River R. R. Co. v. United States*, 212 U. S. 481, 492, and no reason is suggested why Congress has not equal power to charge the partnership assets with a liability and to personify the company so far as to collect a fine by a proceeding against it by the company name. That is what we believe that Congress intended to do. It is to be observed that the structure of the company under the laws of New York is such that a judgment against it binds only the joint property, *National Bank v. Van Derwerker*, 74 N. Y. 234, and that it has other characteristics of separate being. *Westcott v. Fargo*, 61 N. U. 542. *Matter of Jones*, 172 N. Y. 575. *Hibbs v. Brown*, 190 N. Y. 167. Indeed, Article VIII of the constitution of the State after providing that the term corporations as there used shall be construed to include all joint stock companies, &c., having any of the powers or privileges of corporations not possessed by individuals or partnerships, as these companies do, *Matter of Jones*, 172 N. Y. 575, 579, goes on to declare that all corporations may sue and be sued 'in like cases as natural persons.' We do not refer to the law of New York in order to argue that by itself it would suffice to make applicable the principle of *Liverpool*

& London Life & Fire Ins. Co. v. Oliver, 10 Wall. 566. We refer to it simply to show the semi-corporate standing that these companies already had locally as well as in the popular mind, and thus that the action of Congress was natural and to be expected, if we take its words to mean all that by construction they import.

Judgment reversed.

SOUTHERN PACIFIC TERMINAL COMPANY *v.* INTER-
STATE COMMERCE COMMISSION AND YOUNG.
YOUNG *v.* INTERSTATE COMMERCE COMMISSION
ET AL.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF TEXAS.

219 U. S. 498 (1911).

THIS is a bill in equity to enjoin an order of the Interstate Commerce Commission requiring appellants to cease and desist, on or before the first day of September, 1908 (subsequently postponed to November 15, 1908), and for a period of not less than two years thereafter, from granting and giving undue preferences and advantages to one E. H. Young, a shipper of cotton seed products at the port of Galveston, Texas, through failure to exact from him payment of wharfage charges for handling cotton seed cake and meal over the wharves, docks and piers of appellants, while at the same time exacting such charges from other shippers of cotton seed cake and meal, and from giving and allowing him or any other person whomsoever, for his exclusive use, space on the wharves of appellants at Galveston for use in the storage and handling of cotton seed cake and meal, while contemporaneously refusing and denying similar privileges to other shippers under substantially similar circumstances and conditions.

Young was not a formal party before the Interstate Commerce Commission. However, he was made a respondent in this suit, and filed an answer and cross bill. The Commission demurred to both bill and cross bill, and, the demurrer being overruled, answered.

On final hearing the case was submitted upon an agreed statement of facts, and both bills were dismissed.

The most important facts we set out below and in the opinion.

We refer to the report of the Interstate Commerce Commission for further details.

The Republic of Mexico conveyed to one Menard the property upon which the wharves of the Terminal Company are situated. Menard conveyed the property to the president and directors of the Galveston City Company, who conveyed it to Collis P. Huntington for the sum of \$200,000, and it is recited in the deed to him that it "is made upon the further Express Covenant and condition as follows: . . . when through and by means of such acts of Congress, act of the legislature, and ordinance and conveyance from the city of Galveston, if any, as may be required for the purpose, . . . the right has been secured to the said Collis P. Huntington, or his heirs or assigns, to construct piers, as he or they may from time to time determine, . . . then and in that event the said Collis P. Huntington, his heirs or assigns, will within six months thereof commence the construction of terminal facilities upon the property . . . for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

The city of Galveston, on the fourth of February, 1899, passed an ordinance which recited the conditions of Huntington's purchase to be as above stated, and that it was greatly to the interest of the city that the work contemplated by him should be performed, and that for the proper utility of the property no streets should be opened through or across it, and it was ordained that streets, avenues or alleys, if any, theretofore opened, laid out or in any manner designated upon the property be perpetually abandoned, discontinued and closed. And Huntington, his heirs and assigns, were granted the right perpetually to construct and maintain piers as he or they might from time to time determine, "and to maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems, their successors or assigns." It was provided that if Huntington should "charge wharfage for the use of such piers and other facilities upon said property, except so far as wharf service" might be covered by the freight rate, all such wharfage should be subject to the regulation of the railroad commission of Texas. And it was recited that it was greatly for the public interest that the property "should be developed for shipping and transportation purposes, and that the shipping facilities of the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and State. . . ."

The ordinance was ratified by an act of the legislature approved May 1, 1899. The act set out the ordinance in full and relinquished to Huntington the title and claim of the State to the property upon the conditions expressed in the ordinance and, in addition to subjecting the wharfage charges to regulation by the railroad commission, required an annual report to that body. And it was provided "that the system of railroad tracks" which might be constructed by Huntington on the property should connect with the track of any railroad company which might be built to the property, at a place designated; and, further, that there should be no consolidation of the property, or the stock or franchise of any corporation which might own or control the same, with the Galveston Wharf Company or any other wharf company by which the "wharf or other terminal charges should be fixed," and that "no charter formed for the use, operation and management of the property" should be granted without containing the section providing as above.

Huntington performed the conditions expressed in the conveyance and in the ordinance and the act of the legislature.

The Southern Pacific Terminal Company is a Texas corporation, organized in 1901 to construct and maintain wharves and docks for the accommodation of all kinds of vessels, "and to avail of, use and enjoy the properties, rights, privileges and franchises granted and described and referred to in the act of the legislature of the State of Texas of May' 1, 1899, ratifying the ordinance of the city of Galveston, and to construct and maintain upon the property terminal facilities for the use of what are commonly called the Southern Pacific Railroad and Steamship Systems."

At the time of the incorporation of the Terminal Company the following were commonly referred to as the Southern Pacific Railroad and Steamship Systems: the line of steamships owned by the Southern Pacific Company, running from New York to Galveston and New Orleans, and also running from and between the latter city and Havana; Morgan's Louisiana and Texas Railroad and Steamship Company; the Louisiana Western Railroad, which leads from New Orleans to the Sabine River; the Texas and New Orleans Railroad, leading from that river to the city of Houston; the Galveston, Harrisburg and San Antonio Railway, and the railroads in which the Southern Pacific Company owns stock, extending from the connection of the latter in El Paso at the Rio Grande River to San Francisco. Each of the railways was incorporated as a separate and distinct railway and has its

own officers and board of directors, but the Southern Pacific Company owns ninety-nine per cent of their stock and the same per cent of the stock of the Terminal Company. The two latter companies have the same president, and the Galveston, Harrisburg and San Antonio Railway Company and the Terminal Company have the same general manager.

Import and export traffic passing through Galveston passes over the wharves of the Terminal Company, and the only track facilities for such traffic are those owned by the Terminal Company on its own lands. And the Galveston, Harrisburg and San Antonio Railway is the only railway having physical connection with the tracks of the Terminal Company, and it does all of the switching to and from the tracks of the Terminal Company, charging \$1.75 per car. The latter company receives a trackage charge of 50 cents per car.

The Terminal Company owns no cars or locomotives and issues no bills of lading. It owns no stock in any of the railroads or corporations in which the Southern Pacific owns stock. It carries on a wharfage business and publishes a schedule of charges for such business, which, however, is not filed with the Interstate Commerce Commission, its charge being twenty cents per ton on cotton seed meal and cake passing over its docks, and is shown as wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and all other railways entering Galveston. Such tariffs do not show that any exception is made as to the docks occupied by E. H. Young as hereinafter shown, but as a fact the wharfage charge is not imposed by the Terminal Company on the cotton seed meal and cake handled over the dock of E. H. Young other than as the same may be included in the general lease or contract price fixed as hereinafter indicated.

The Terminal Company was a party to numerous circulars issued by the Southern Pacific Companies, known as the "Sunset Route," so termed, principally for advertising purposes. The circular of May 24, 1907, shows terminal charges (other than storage and switching). At the port of Galveston the circulars show a charge of one cent per 100 pounds on cotton seed cake and meal.

The Terminal Company has on its property two piers, known as pier "A" and pier "B," and has erected on them all facilities for handling imported and exported freight, and all freight which may come to or pass over its wharves, and it has abundant land

under water upon which to erect other piers if they should become necessary.

It charges a fixed wharfage for all freight passing over its piers to or from vessels berthed thereat. The Galveston Wharf Company affords similar public wharfage facilities at the port of Galveston, having a number of piers. If the facilities of the Galveston Wharf Company should be destroyed those of the Terminal Company would become inadequate for handling the import and export and coastwise business. Ships to and from foreign ports, and coastwise ships other than those of the Southern Pacific Company, berth at piers "A" and "B," and there receive and deliver freight, and at these piers the Terminal Company carries on its general wharfage business.

In the building of pier "B" it was necessary to dredge a slip west of it, where ships could berth, and in order that the soil, through the action of storm and wave, should not drift into the slip, a bulkhead was built. To the westward of the slip the lands of the Terminal Company were lying idle and useless, they not being needed by it, and in pursuance of negotiations with Young the company proceeded to construct a pier, known as pier "C," for the use of Young, and to erect thereon a warehouse, shed and platform for his use, the original construction and subsequent enlargement of which cost the company about \$65,000. At this time the pier is 300 feet wide at its widest part and about 1,400 feet in length.

The negotiations terminated in a lease under which Young is to pay the Terminal Company a yearly rental of \$15,000, payable monthly from the first day of November, 1906. And he agrees that he will route all shipments of cotton seed and cotton seed products purchased or shipped by him "over the lines of said Terminal Company and its connections, according to the instructions of said Terminal Company from time to time," and that he will insist upon and enforce such routing, except where the enforcement will prevent him from purchasing such products or from obtaining shipments which will be ready to move immediately and for which cars cannot be procured for the routing required. It is provided, however, that Young shall not be bound by these provisions if the rates be not equal to or lower than those of other competing lines or the service be not as adequate, but notice is to be given of such lower rates and service and an option to meet them.

The business of Young is that of a merchant and manufacturer,

engaged in buying, selling and converting cotton seed cake and meal for his own account. He took possession of pier "C" and the improvements erected thereon by the Terminal Company under his contract with the latter company, paying the price stipulated in the contract, and has placed thereon cake, sacking and grinding machines, representing an investment of \$50,000. Young's business consists in buying cotton seed cake in the interior, shipping it to himself by carloads at pier "C," there grinding it into meal, sacking it and loading it into steamships berthed at pier "C" for export.

All cotton seed meal cake passing over piers "A" and "B" pays a wharfage of 20 cents per short ton. Young pays no wharfage or storage charge other than as the same may be included in the rental of \$15,000 per year. If any exporter handles cotton seed meal or cake over pier "C" the wharfage of 20 cents per ton is paid by him to Young.

Young has certain advantages by reason of his contract with the Terminal Company, which are enumerated in the agreed statement of facts and the result of which is stated as follows: "He makes a sum equal to 30 or 40 cents per ton more than he would receive if he handled his export product under methods in existence before he established his plant on pier 'C' and adopted the method of business he follows. This 30 to 40 cents per ton is in addition to the ordinary buying and selling profit." He at times pays more for cotton seed cake than his competitors can afford to pay, and at times he can undersell them in European markets, and since he commenced business some of the exporters who were engaged in business when he commenced have ceased exporting. A comparison of his business with that of all other exporters of cotton seed cake shows that from September 1, 1906, to September 1, 1907, he exported 105,000 tons of cotton seed cake and about the same amount of cotton seed meal; they, 50,000 tons of both products.

"Some of the cotton seed cake producers at interior mills in the State complain that Young is able to dominate the Texas market, and that his method of conducting business at Galveston enables him to command the foreign trade and may become a detriment to the cotton seed cake and meal industry, in that Young might acquire a monopoly. Others entertain a contrary opinion. They all agree that if there was a general establishment of plants in Galveston, so that a monopoly could not be acquired, it would be of great benefit to the cotton seed industry.

* * * * *

"On the present constructed docks of the Galveston Wharf Company and the Terminal Company, with the structures as now located thereon, there is not space enough to furnish all exporters doing business at Galveston with space for erecting machinery and handling export business in the same manner as is done by Young."

This proceeding was instituted September 11, 1907, by Carl Eichenberg, an exporter of cotton seed and its products from the port of Galveston, by filing his complaint or petition before the Interstate Commerce Commission against the Southern Pacific Company and the Terminal Company, complaining that the companies, by the arrangement with Young, were violating § 3 of the act to regulate commerce, by giving him an undue and unreasonable preference and advantage over his competitors.

By order of the Commission the Galveston, Harrisburg and San Antonio Railway Company and other railroad companies entering Galveston were made parties defendant.

Answers were filed and full hearing was had by the Commission, which on June 24, 1908, made its report and order.

No rehearing was asked by defendant before the Interstate Commerce Commission. Young was not made a party to the proceedings before the Commission, but he appeared and testified as a witness for the Terminal Company, and his counsel was present at the hearing when the testimony was taken and engaged in the examination of witnesses. Young was also present when the case was argued and submitted.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. H. M. Garwood* were on the brief, for appellants.

Mr. Wade H. Ellis and *Mr. Luther M. Walter* for appellee, the Interstate Commerce Commission.

MR. JUSTICE MCKENNA, after stating the facts as above, delivered the opinion of the court. . . .

Four errors are assigned in the action of the Circuit Court in dismissing the bill of complaint. (1) The Interstate Commerce Commission had no jurisdiction over the Terminal Company, it not being a common carrier, and therefore not subject to the act to regulate commerce.¹ (2) The Commission had no power or authority to declare the lease to Young illegal. (3) The lease

¹ Only the part of the opinion relating to this point is printed here.

does not constitute an unlawful or undue preference or advantage within the meaning of the act to regulate commerce. (4) The Commission by its order assumed to control intrastate and foreign commerce, not subject to the act to regulate commerce.

Two facts are prominent in the case, that the piers of the Terminal Company are facilities of import and export traffic at the port of Galveston and that the arrangement of the Terminal Company with Young has enabled him to largely and rapidly increase his business until his exports of cotton seed products are more than twice those of all other competitors, that he derives therefrom 30 to 40 cents per ton over the ordinary buying and selling profit, and that some who were his competitors have ceased to export. A direct advantage to Young is manifest. A direct detriment to other exporters is equally manifest.

The situation challenges attention. Appellants find in it nothing but the natural and legal result of the sagacity which could see an opportunity for profit and the enterprise which could avail of it. It was the simple matter on the part of Young, it is contended, of bringing his business to the ship's side and cutting out intervening expenses. And it is said that the Terminal Company had an equally lawful inducement. It had an idle property, it is contended, over which it had absolute control and which it turned to use and profit by the arrangement with Young. And this, it is insisted, was a simple exercise of ownership. If the elements of the controversy are correctly stated, the justification may be considered as made out.

Appellants make much of their title and, assuming it to be absolute, assert the right to an unrestrained use of the property. But the assertion overlooks or underestimates the condition expressed in the deed to Huntington, that from his estate to the Terminal Company, in the ordinance of the city of Galveston, and in the act of the legislature of the State of Texas. The condition expressed in all of them was that terminal facilities should be constructed upon the property for the use of the Southern Pacific Railroad and Steamship Systems. The act of the legislature declared that the property "should be developed for shipping and transportation purposes, and that the shipping facilities at the port of Galveston should be thereby improved and enlarged in order to better accommodate the commerce of the port and of the State." And wharfage charges, except so far as they should be covered by the freight rates, should be subject to regulation by the railroad commission of the State.

It is clear, therefore, that it was the purpose of the ordinance and of the act confirming it to secure shipping facilities for the city, open to public use, and necessarily so, for the property was to be the terminal of a railroad and steamship system. It may be, as it is contended, that there was no necessity for the ordinance, "except for the purpose of a valid relinquishment of the municipal right, often asserted by it, of opening streets through the bay front property and constructing wharves thereon." The relinquishment was treated as valuable and Huntington pledged the property to a public use as a consideration for it. And, as we have said, such use was also a condition expressed in the act of the legislature. It was not discharged by the expenditure of \$150,000 and the erection of wharves by Huntington, as seems to be the contention.

The case has no likeness whatever to *Louisville &c. R. R. Co. v. West Coast Co.*, 198 U. S. 483. In the latter case there was no discrimination against the West Coast Company by the railroad company or a preference given to any person. The West Coast Company had the same privilege of using the wharves of the railroad company as other shippers were given. It asserted other privileges. It asserted the privilege of using the wharf for the purpose of transferring goods into vessels which it might arrange to take them; in other words, not into the vessels of the railroad company or into those with which it had traffic agreements. And we said, through Mr. Justice Peckham, "In brief, the fact seems to be that the only complaint of the plaintiff (West Coast Company) is that the defendant (the railroad company) will not permit competing vessels to make use of its wharf for the purpose of such competition."

It is true that there was a contention that the wharf was a public one, but the contention was based only on the fact that the wharf was built at the foot of a public street by authority from the city of Pensacola and the State of Florida. That fact alone was not considered sufficient to support the contention. And it was said, "The city or State authorities in granting the right to erect such facilities might, of course, have attached such conditions as they thought wise, but in their absence neither the public nor this plaintiff, as the owner of goods, would have the right, on this state of facts, to go to the wharf with vessels for the purpose of continuing transportation of goods in competition with defendant." It is true it was said that the railroad company never became a common carrier as to the wharf, in the sense that

it was bound to accord to the public or to the West Coast Company the right to use it upon payment of compensation. But it was added that the railroad company would be bound to carry the West Coast Company's goods on the rails which led to the wharf, for the same purpose and upon the same terms that it did for others, viz., in order that it might itself, or through others it had contracted with, forward the goods beyond its own line. And it was further said that the West Coast Company demanded more than this; it demanded that the railroad company should carry its goods in order that it might itself forward them by vessels of its own selection, and that the railroad company should surrender possession of enough of its wharf to enable the other company to do so.

Nor is *Weems Steamboat Company v. People's Company*, 214 U. S. 344, applicable to the pending controversy. The contest there was between two independent lines of steamboats, the one claiming a right to use the wharves of the other, on the ground that the wharves had been dedicated to the public. The fact was found adversely to the contention, and the claim of right to the use of the wharves denied. A review of the reasoning of the court is unnecessary. There is great difference between competing carriers claiming the right to use the facilities of one another and the patrons of the same carrier contending for equality of treatment. In stating this we assume that the wharves in the pending case are the instruments of a common carrier. This is, however, denied, and it is asserted that the Terminal Company is purely a wharfage company, and "has no power under its charter to act as a common carrier." The contention is based on a partial view of the conditions. The Terminal Company was incorporated to execute the purposes expressed in the act of the legislature of the State of Texas, that is, to construct terminal facilities for the Southern Pacific Railroad and Steamship Systems, and to accommodate the export and import traffic at Galveston; and, necessarily, as instrumentalities of such traffic, wharves and piers are as essential as steamships and railroads, and are, in fact, as they were intended to be by the charter of their authorization, parts of a system. The only track facilities for movement of cars to or from the ships, from or to the tracks of the Southern Pacific Railways, are on the Terminal Company's lands, and are owned by it. To these tracks the Galveston, Harrisburg and San Antonio Railway switches cars for other railroads, charging \$1.75 per car, and the Terminal Company receives a trackage

charge of 50 cents per car. It is true that the Terminal Company does a wharfage business and publishes a schedule of its charges, which, while not filed with the Interstate Commerce Commission, shows a charge of 20 cents a ton on cotton seed cake and meal, and this appears as a wharfage charge in the tariffs of the Galveston, Harrisburg and San Antonio Railway Company and other railways entering the city of Galveston. And, besides, the Terminal Company was a party to numerous circulars issued by the Southern Pacific Railway Company, and that effective May 23, 1905, was filed with the Interstate Commerce Commission. These circulars gave terminal charges at the port of Galveston. The charge on cotton seed meal and cake was given at 1 cent per 100 pounds. Shipments on through bills of lading include in the freight rate the wharfage charge.

Another and important fact is the control of the properties by the Southern Pacific Company through stock ownership. There is a separation of the companies if we regard only their charters; there is a union of them if we regard their control and operation through the Southern Pacific Company. This control and operation are the important facts to shippers. It is of no consequence that by mere charter declaration the Terminal Company is a wharfage company or the Southern Pacific a holding company. Verbal declarations cannot alter the facts. The control and operation of the Southern Pacific Company of the railroads and the Terminal Company have united them into a system of which all are necessary parts, the Terminal Company as well as the railroad companies. As said by the Interstate Commerce Commission, "the Terminal Company was organized to furnish terminal facilities for the system at the port of Galveston," and it is further said that "through shipments on the railroad lines from and to points in different States of the Union pass and repass over the docks of the Terminal Company. It forms a link in this chain of transportation. It is necessary to complete the avenue through which move shipments over these lines owned by a single corporation." And this unity of the railroad's lines and the terminal facilities is recognized in the lease to Young. By it he agrees to route all of his shipments over "the lines of the Terminal Company and its connections, according to the instructions of said Terminal Company from time to time." And provision is made against the possibility of other lines bidding for the traffic by lower rates. In such event he must give notice to the Terminal Company and give it "the option of meeting such proposed rates,"

and if the company "elects to do so," then he "shall not divert such shipments, but shall abide by the provisions" of his agreement. And surely a system so constituted and used as an instrument of interstate commerce may not escape regulation as such because one of its constituents is a wharfage company and its dominating power a holding company. As well said by the Interstate Commerce Commission, "a corporation such as this Terminal Company, which has 'competing lines,' should not be permitted to defeat the jurisdiction of this Commission by showing that it is not in fact owned by any railroad company. . . . The Terminal Company is part and parcel of the system engaged in the transportation of commerce, and to the extent that such commerce is interstate the Commission has jurisdiction to supervise and control it within statutory limits. To hold otherwise would in effect permit carriers generally, through the organization of separate corporations, to exempt all of their terminals from our regulating authority."

*Effect of
Contract
relating*

"The reasoning of the Commission is justified by the statute. It includes in the term "railroad" "all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property."

The property of the Terminal Company is "necessary in the transportation or delivery" of the interstate and foreign freight transported by the lines of the Southern Pacific system. It is the only terminal for freight moving over the lines of such system, the rails of one of those lines, the Galveston, Harrisburg and San Antonio Railway Company, connecting with tracks upon the docks of the Terminal Company. That the latter collects a trackage charge from the former and it a switching charge from the Terminal Company are, to quote the Commission, "but incidents of the separate corporations."

In opposition to these views appellants urge the legal individuality of the different railroads and the Terminal Company and cite cases which establish, it is contended, that stock ownership simply or through a holding company does not identify them. We are not concerned to combat the proposition. The record

does not present a case of stock ownership merely or of a holding company which was content to hold. It presents a case, as we have already said, of one actively managing and uniting the railroads and the Terminal Company into an organized system. And it is with the system that the law must deal, not with its elements. Such elements may, indeed, be regarded from some standpoints as legal entities; may have, in a sense, separate corporate operation; but they are directed by the same paramount and combining power and made single by it. In all transactions it is treated as single. In the ordinance of the city of Galveston, in the act of 1899, of the legislature of the State, and in public circulars and in the lease of Young, it is the system which is dealt with and not its separate links. And, we have seen, the terminal facilities which the Terminal Company was authorized to maintain were for the system, not for the corporate elements considered separately. . . .

Decree affirmed.

3. SERVICES AND PROPERTIES AFFECTED.

GRAIN ELEVATION ALLOWANCES AT ST. LOUIS, MO., AND EAST ST. LOUIS, ILL.

30 I. C. C. 696 (1914).

A. P. Humburg and F. H. Law for Illinois Central Railroad Company.

E. D. Mohr for Louisville & Nashville Railroad Company.

Charles Rippin and H. J. Hausner for Merchants' Exchange of St. Louis.

REPORT OF THE COMMISSION.

McCHORD, *Commissioner*:

The withdrawal by the Louisville & Nashville Railroad Company, effective November 25, 1913, of an elevation allowance of $\frac{1}{2}$ cent per bushel on grain at St. Louis, Mo., and East St. Louis, Ill., when destined to Evansville, Ind., was protested by the Merchants' Exchange of St. Louis. Included in the order of suspension was the tariff of the Illinois Central Railroad, providing cancellation similar to that of the Louisville & Nashville. The schedules in question are designated Louisville & Nashville Railroad Company, third revised, page 338, of I. C. C. No. A-12658, and Illinois Central Railroad Company (Northern and Western lines), seventh revised, page 117, of I. C. C. No. A-8213.

The line of the Illinois Central Railroad from East St. Louis to Evansville is very indirect, and little grain moves via that route. The elevation allowance when made is adjusted by claim. That the allowance, so far as the Illinois Central is concerned, is of no moment is evidenced by the fact that no claim was made for elevation on Evansville business during the year 1913.

There is dispute as to the origin of the allowance by the Louisville & Nashville Railroad on Evansville grain. It is the claim of that respondent that it was first made as the result of the action of certain lines operating from East St. Louis, Ill., to points in central freight association territory in publishing the allowance on all grain destined to points east of the Indiana-Illinois state line. These lines, having circuitous routes to the Ohio River crossings, did not maintain proportional rates to those points, and could not compete for the business. The tariffs of the direct lines, which provided proportional rates from St. Louis and East St. Louis to Louisville and Cincinnati, contained notes that on shipments handled under the proportional rates no elevation allowance would be made. The notation was omitted as to Evansville. It is not disclosed why, although it is stated that the same reasons governing the action as to Louisville and Cincinnati, viz, the low proportional rates, would justify a similar exception as to Evansville. The effect of this is that with the exception of Evansville no elevation allowance is made at St. Louis and East St. Louis on grain moving to Ohio River crossings, for the reason that all grain thus handled moves on proportional rates. The proportional rate from St. Louis to Evansville is 5 cents, and from East St. Louis 4 cents. The rate from East St. Louis to Evansville does not except switching absorption or elevation allowance at East St. Louis. The proportional rate to Louisville excepts both.

The Supreme Court has held that elevation is a part of transportation which the railroad is required to furnish under the first section of the act. This has been interpreted to mean such elevation as is a legitimate and necessary part of transportation as distinguished from commercial elevation; that a railroad may employ the owner of an elevator to perform a part of the transportation service which is incumbent upon the railroad, paying a reasonable compensation therefor. Applied to the present investigation, we have to determine whether elevation at St. Louis and East St. Louis is a necessary incident to the handling of grain from the field to Evansville. It does not appear that it is. The east side lines are desirous of handling the shipments in foreign

equipment. Transfer at St. Louis is not necessary to secure correct weights, which can be satisfactorily determined at the elevator at Evansville or on the scales of the east side lines. The testimony is that comparatively few cars are not loaded to their capacity. The evidence seems to support the contention of respondent that none of the reasons in which the elevation allowance had its beginning obtain with respect to St. Louis and East St. Louis on business destined to Evansville, Ind. Having regard for the short distance which the traffic is hauled by the east side line, 165 miles from St. Louis and 162 miles from East St. Louis, the record establishes lack of transportation necessity for elevation at the places named. . . .

ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY *v.* UNITED STATES.

232 U. S. 199 (1914).

In 1909, Associations, representing California fruit-growers, filed with the Commerce Commission complaints against numerous railroad companies attacking the freight and refrigeration charges on citrus fruit shipped from California to Eastern points. Much testimony was taken, from which it appeared that the orange crop amounted to about 50,000 cars per annum, of which the 20,000, shipped in warm weather, required some form of refrigeration in order to keep the fruit in condition for use at the end of the journey. At the close of the first hearing June 11, 1910 the Commission held (19 I. C. C. 148) that \$1.15 per cwt. was a reasonable freight-rate on oranges. Other questions in the case were postponed until January 14, 1911, when the Commission made a report (20 I. C. C. 106) as to the reasonableness of the carriers' charges of \$62.50 per car for refrigeration and \$30 for services in shipments pre-cooled by the consignor.

The Commission found that in refrigeration by the carriers they furnished all the ice and performed all of the services, including re-icing enroute. It found that there was a total of about 11 tons of ice furnished, but owing to the melting the average weight of ice hauled was 8,000 lbs., the freight on which to Chicago, was .25 per 100. It cost something to repair the bunkers, and the Commission recognized the right to include an additional sum to cover risk and profit.

The total revenue of \$345.30 from such shipments was made up of the following items:

Freight on 27,200 lbs. of oranges @ \$1.15	\$312.80
Cost of 11 tons of ice.....	\$30.
Freight on 8,000 lbs. average weight of ice hauled	
@ .25	20.
Damage to bunkers	5.
Sum to cover risk and profit.....	7.50
	62.50
Gross Receipt.....	\$375.30
Less cost of ice.....	30.00
Freight and refrigeration charges	\$345.30

The Commission found that the charge of \$62.50 for refrigeration services was reasonable.

It further appeared that the Government had conducted certain experiments with a view of determining whether an advantage would not be derived from pre-cooling the fruit before the bunkers were filled with ice. There was testimony that the carriers had reached the conclusion that if the fruit was pre-cooled before the movement of the car began, there would be a corresponding saving in the amount of ice needed in the bunkers. They accordingly had erected plants at which the fruit could be pre-cooled and included such pre-cooling service in the regular refrigeration charge of \$62.50.

Certain shippers claimed that better results were obtained where the fruit was pre-cooled immediately after it was taken from the grove and before it was placed in the car. They therefore adopted a method in which the shipper chills the fruit, cools the car, furnishes the ice and fills the bunkers at a cost to himself of \$32.50. The carrier for its services in connection with hauling such pre-cooled shipment charged \$30, intending thereby to make the rates on pre-cooled fruits the same, whether the pre-cooling was by the shipper or the carrier. In determining whether this \$30 was a reasonable charge for service rendered by the carrier in hauling fruit pre-cooled by the shipper, the Commission said (20 I. C. C. 120) that no re-icing was necessary en route and that "it would be a liberal estimate to put the average weight of the ice during the entire journey at 5,000 lbs. For the hauling of this ice the carriers are entitled to fair compensation, as they are in the case of Standard Refrigeration." There is also an "expense in

providing and keeping in repair the ice bunkers. . . . The carrier is, therefore, entitled to this additional cost, which is about \$5 per car per trip one way." (20 I. C. C. 120.)

Where the fruit is pre-cooled by the shipper, the boxes are packed so much closer together that the load is one-sixth greater than in case of shipments pre-cooled and refrigerated by the carrier. The result is that the revenue from a car of fruit pre-cooled by the shipper would be —

Freight on 33,000 lbs. of oranges at \$1.15.....	\$379.50
Freight on 5,000 lbs. of ice at 25 cents per hundred	12.50
Damage to bunkers (and profit allowed?)	7.50
	<u>\$399.50</u>

or, \$54 more than the revenue of \$345.30 from a car pre-cooled and refrigerated by the carrier.

The Commission further said: "As bearing upon the reasonableness of the rate, the carriers showed the cost of the movement of these oranges per gross ton — that is, per ton of combined weight of car and of contents as compared with other articles — claiming that this was the true basis upon which to fix rates. So treating these pre-cooled shipments, it will be found that the carrier receives more per gross ton or handling the pre-cooled car than for either the ventilated or the refrigerated shipment. By every canon of rate-making which has been applied by carriers in the past, or which is relied upon by them now, these pre-cooled shipments at the standard rate without additional compensation are better business than either the ventilated or the refrigerated movement. Clearly these growers who have devised and perfected this system of shipment, should not be compelled to pay for the privilege of using it more than the fair cost to the carrier of providing the additional facilities which are not included in the ventilated rate with a fair profit." 20 I. C. C. 121.

The report concluded as follows: "We are of the opinion that the present pre-cooling charges of the defendants of \$30 per car are unjust and unreasonable, and that these charges should not exceed for the future \$7.50 per car, but the defendants may, as a condition of making this charge, require that pre-cooled cars be loaded seven tiers wide and two tiers high, and may provide by their tariffs a proper minimum to accomplish this result, the amount of which would depend upon the length of the car." 20 I. C. C. 123.

The carriers, in obedience to this order, put in a tariff of \$7.50 for pre-cooling services, but at once filed another tariff, effective July 1, 1911, reciting that "the privilege heretofore permitted to shippers of citrus fruit to pre-ice carload shipments is withdrawn, the carriers retaining and exercising the exclusive right and control of furnishing and doing all icing and refrigeration of citrus fruit in all cases where shipper does not specifically request or direct shipments to move solely under ventilation."

Immediately thereafter the orange-growers' associations filed proceedings to cancel this withdrawal tariff and to compel the carriers to continue to extend to shippers the old privilege of pre-cooling at the new rate of \$7.50. At the hearing the evidence and reports of the Commission in the former case were stipulated into the record and, on April 8, 1912 (23 I. C. C. 267, 271), the Commission held that the shippers had the right to the pre-cooling privilege and again ruled that \$7.50 was a reasonable charge for the services rendered by the carriers.

The Railroad Companies then filed a petition in the Commerce Court attacking the original order of January 14, 1911 (fixing \$7.50 as a reasonable charge on pre-cooled shipments) and the last order of April 8, 1912 (requiring the roads to permit pre-cooled shipments at that sum), contending that shippers had no right to ice the bunkers. They also insisted that the \$7.50 rate was confiscatory and did not equal the \$17.50, which the Commission itself had found to be the actual cost of services rendered in connection with pre-cooled shipments. The carriers, thereupon prayed that both orders should be annulled and set aside.

The Commerce Court (204 Fed. Rep. 647, 651) adopted the finding of the Commission that in pre-cooled shipments the revenue was \$54 greater than in the Railroads' method of refrigeration, and concluded by saying that, in view of that fact, "we do not think that the petitioners have any valid complaint to make of the charge of \$7.50 per car established by the Commission." It further held that under the facts appearing in the record, the shipper had the right to furnish the ice in pre-cooled shipments and thereupon it dismissed the petition. The case was then brought here by appeal.

Mr. Gardiner Lathrop and Mr. F. H. Wood, with whom Mr. Robert Dunlap, Mr. T. J. Norton, Mr. A. S. Halsted, Mr. C. W. Durbrow and Mr. W. F. Herrin were on the brief, for appellants.

Mr. Blackburn Esterline, Special Assistant to the Attorney

General, with whom *The Solicitor General [Davis]* was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. William E. Lamb, with whom *Mr. George E. Farrand*, *Mr. Rush C. Butler* and *Mr. Stephen A. Foster* were on the brief, for the Arlington Heights Fruit Company *et al.*, intervenors.

MR. JUSTICE LAMAR, after making the foregoing statement of facts, delivered the opinion of the court.

There are many cases between shipper and carrier in which each insists that the other is bound to furnish service or facilities connected with the transportation of freight. The present record, however, presents an instance where both parties are contending for the privilege of supplying an article needed in the proper shipment of fruit — the consignor claiming that icing is a necessary part of the loading, which he is authorized to supply; while the carriers insist that icing is a part of refrigeration, by statute made transportation, which they are bound to provide and for which they are entitled to collect reasonable compensation. The determination of these conflicting claims necessitates an examination of the two methods under which, in warm weather, oranges are shipped from California to the East.

In what is called Standard Refrigeration, the boxes, of the aggregate weight of 27,200 pounds, are so placed as to leave spaces between them wide enough to admit of a free circulation of air chilled by ice in the bunkers. Subsequently the carriers put in a system of pre-cooling, under which after the cars had been loaded they were taken from the point of shipment to Refrigerating Plants owned by the carriers, where whole trainloads are pre-cooled at one time by means of blasts of very cold air driven into the car through and around the boxes. At the end of three or four hours the fruit is sufficiently chilled, the bunkers are then filled with about 10 tons of ice, furnished by the carrier, and the train is started on its journey to the East — the bunkers being re-iced from time to time as needed at stations along the route. For this entire service the Commission held that the carrier's charge of \$62.50 was reasonable.

A different method obtains where the icing of the car is done by the shipper at his own expense. In that class of cases the oranges are taken from the grove directly to a cold room having a temperature of about 33° F. There the boxes are allowed to remain

for periods of from 24 to 48 hours, and until the fruit is chilled to the center. When thus pre-cooled, the boxes are ready for shipment. A refrigerator car is then placed on the track opposite the door of the cold room of the warehouse with which it is connected by a collapsible enclosed passageway, so arranged as to exclude the outside air, while at the same time allowing that from the cold room to enter and cool the interior of the car. Through this passageway the oranges are trucked from the warehouse to the car and, as they have been chilled to the center, the boxes are packed close together forming a solid mass weighing 33,000 lbs., with a temperature of about 35° F. The doors and vents of the car are promptly and tightly closed, the bunkers are immediately filled with unusually large cakes of ice, in order to reduce the rate of melting, and the fruit is then forwarded under a filed tariff which provides that re-icing is unnecessary, and that the shipper will make no claim for damage occasioned by failure to re-ice in transit. For their services in connection with such pre-cooled shipments the carriers were allowed to charge \$7.50 but the Commission refused to permit them to charge for the ice needed to keep the fruit cool between warehouse and destination.

1. This ruling is attacked by the appellants, who contend that icing is a part of refrigeration, which the Hepburn Act¹ makes a part of the transportation they are bound to furnish upon reasonable request. They insist that in order to meet the duty, thus imposed by statute, they have been compelled at great expense to erect immense plants where trainloads of fruit can be cooled and where an enormous quantity of ice is manufactured for refrigeration purposes. They argue that, being bound to furnish all necessary icing and re-icing and having at great cost prepared to furnish the supply, it is not only just, but a right given by statute, that they should be allowed to provide all needed icing or refrigeration at a rate to be approved by the Commission.

Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and cannot be compelled to accept those tendered by the shipper on condition that a lower freight rate be

¹ . . . The term "transportation" shall include . . . all services in connection with the receipt, delivery . . . ventilation, refrigeration or icing, . . . of property transported; and it shall be the duty of every carrier . . . to provide and furnish such transportation upon reasonable request therefor. (Act of June 29, 1906, c. 3591, § 1, 34 Stat. 584.)

charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers cannot be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another.

This contention was sustained by the Commission, which recognized that "the shipper has no right to provide refrigeration himself today and call upon the railroad company for that service tomorrow. To permit such a course is to demoralize the service of the defendants and prevent them from discharging their duty with economy and efficiency. . . . It is the duty of the carrier to furnish refrigeration upon reasonable demand, and in so far as the furnishing of that refrigeration is a part of the service rendered by the carrier, the carrier may insist upon its right to furnish that service exclusively." 20 I. C. C. 116.

2. But of course this does not mean, that because the carriers have ice on hand, they can compel the shipper to have his fruit refrigerated, when, on account of the state of the weather or for other cause, he prefers to have it forwarded under ventilation only. When, however, ice is actually needed and is actually used, the question arises as to whether icing is a part of preparation which can be done by the shipper; or a part of refrigeration (transportation) which, by statute the carrier has the exclusive right to furnish.

To this question no answer can be given that will apply in all cases. For in the shipment of fruit, as in that of other articles, it is impossible to lay down a rule which definitely fixes what loading includes and by whom it must be done. Nor is there any consistent practice on this subject, since from reported cases it appears that the claims of the parties are based rather on interest than on some definite principle. Sometimes the shipper, as here, insists on the right to load and provide necessary appliances. At other times he demands that such service and appliances be furnished by the railroad company. Conversely the carriers sometimes claim, as here, the right to furnish service and facilities, while in other cases insisting that one or both must be supplied by the consignor. Cf. *National Lumber Dealers Association v. Atlantic Coast Line*, 14 I. C. C. 154; *Schultz v. Southern Pacific*, 18 I. C. C. 234; *In re Allowance for Lining and Heating Cars*, 26 I. C. C. 681; 25 I. C. C. 497.

These inconsistent and conflicting demands serve to emphasize the fact that, before the haul actually begins, the right or duty of each party, where not absolutely fixed by statute, must be decided with reference to the special facts of each case.

As a general rule, the carrier loads all freight tendered in less than carload lots while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. This practice has grown up not only because the work can be more satisfactorily performed by the owner, but also because it is impossible for railroad companies economically to load cars at private warehouses or on those tracks where vehicles of the consignor or consignee come and go at the direction of the owner. 25 I. C. C. 490.

3. But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks and binders needed to make the transportation safe; or, the freight may be such as to require special covering, packing, icing or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities, may be quite as uncertain as who is to place the freight on the car, and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required.

Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers — their rights in turn having been adjusted by a reduction in the rate, if the loading is done in whole or in part by the shipper; and by an increase in the rate where the loading is done in whole or in part by the carrier. But, by whomsoever done, the loading must be such as to fit the freight for shipment, and when — by statutory requirement, by valid order of the Commission, or by the carriers' voluntary act, — the car is placed at the consignor's warehouse to be loaded by the shipper, he may not only put the freight on the car but may do all other acts required to fit the freight for its proper shipment — at least, until under a tariff regularly filed, the carrier offers to do what is necessary to secure or preserve what has thus been placed on its car for transportation. The refrigeration and pre-cooling offered by the carrier to shippers of pre-cooled fruit was found not to be the equivalent of the method adopted by the shipper.

4. In the present case the carriers concede that in pre-cooling shipments the consignor had the right to take all of the steps for preparation except the last. They concede that he had the right to pre-cool the fruit, to pre-cool the car, to place the boxes on board the car, to stop the vents and seal the doors. But they deny that he could ice the bunkers, even though that was necessary to the complete preparation, or loading, needed in that particular class of shipments and without which the fruit would be damaged by the rise in temperature, occurring during the time the car is being hauled from the warehouse of the shipper to the icing station of the carrier. Such delay in filling bunkers would nullify most of the advantage of the expensive chilling of fruit and car necessary in the pre-cooling shipments, — permitted, if nor originally encouraged, by the carrier. The privilege was withdrawn — not because the railroad companies were in position to furnish the ice at the proper time and place, but solely because the Commission had reduced the carriers' charge on pre-cooled oranges from \$30 to \$7.50 per car.

The icing may have been so related to refrigeration as to authorize the carriers to render that service. But manifestly they could not be expected to build refrigerating plants near each warehouse; and, the carrier not being in a position to do such icing, the consignor had the same right to provide the necessary supply that he would have had to ice a shipment of fish, to furnish and place standards to secure lumber on an open car, or to fasten to the floor articles which otherwise might be damaged by the jerks and jolts of a moving train. In the absence, therefore, of the carriers' offer, under a filed tariff, to furnish ice at the time and place needed in pre-cooled shipments, or to substitute a service of equal value at practically the same cost, they had no right to prevent the consignor from filling the bunkers so as to fit the freight for proper transportation.¹ . . .

¹ The remainder of the opinion dealing with the power of the Interstate Commerce Commission to issue the order under review is here omitted. — Ed.

DUNNAGE ALLOWANCES.

30 I. C. C. 538 (1914).

F. A. Leland, J. D. Watson, and R. C. Fyfe for Southwestern Tariff Committee lines.

A. H. Lossow for Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

R. D. Coleman for St. Louis Southwestern Railway Company.

J. S. Marvin for National Automobile Chamber of Commerce, incorporated.

S. D. Snow and F. C. Angerstein for International Harvester Company of America.

Victor A. Remy for International Harvester Company of America, National Implement & Vehicle Association, and Illinois Manufacturers' Association.

W. J. Evans for National Implement & Vehicle Association.

H. E. Johnson and G. M. Sherman for Studebaker Corporation.

L. R. Martin for Oliver Chilled Plow Works.

H. A. Laing for Libby, McNeill & Libby.

H. C. Dowling for Morris & Company.

B. H. O'Meara for Douglas & Company.

F. S. Ryan for Corn Products Refining Company.

D. S. Dixon for Southern Cotton Oil Company.

J. W. Bomgardner for John A. Roebling's Sons Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

By schedules, the operation of which was herein suspended until October 23, 1914, respondents sought to cancel from tariffs applying to points in southwestern territory provision for dunnage allowances on shipments in closed cars. As to all of the schedules, the rule which has been in effect since May, 1912, is substantially as follows:

"An allowance of actual weight used, but not more than 500 pounds, will be made for dunnage used by shippers and furnished at their expense to protect freight in carloads shipped in box, stock, ventilated, or refrigerator cars, provided that in no case shall less than the minimum weight applicable to the commodity shipped be charged for. Shippers shall indicate on their shipping

instructions the actual weight of the dunnage used, and any weight in excess of 500 pounds shall be charged for at the rate applicable to the shipment to protect which the dunnage is used."

The position of respondents is that the dunnage allowance encourages inferior and unsafe packing, adds to the transportation risk, and increases the carriers' cost; that in effect it gives preference to shippers loading their goods in bulk, braced, stayed, or supported in cars, as against those tendering goods packed in safe and secure containers, such as boxes, barrels, and crates, which give to carriers the maximum protection and minimum transportation risk and expense; that its continuance will invite, as it has in the past, increasingly numerous demands for the waiving of packing requirements in order to eliminate the cost of packages and reduce the weight of the goods; that it is the nature of the goods, the form in which tendered for conveyance, and their liability to injury in transit which renders dunnage necessary rather than the protection of the carriers' equipment; that there is a sufficient distinction between the conditions surrounding transportation on open and in closed cars to warrant the granting of an allowance in the one case and its denial in the other, and that the rates and minimum weights themselves were established long before the practice of allowing for dunnage, which had been in effect in contiguous territories as the result of the action of some individual carriers, was forced upon these respondents.

Protestants heard in opposition to the cancellation represent manufacturers and shippers of such articles as automobiles and parts, agricultural implements, wire rope and cables, starch, and lard pails. They contend that dunnage, including blocks, braces, double decks, bulkheads, and door shields, is used as much for the protection of the carriers' equipment as for the protection and safe transportation of the shipment; that such dunnage constitutes transportation accessories which it is the carriers' duty to furnish, and when furnished by shippers should be hauled free; that there is no sound reason for discontinuing allowances on freight in closed cars while continuing to grant them in connection with freight in open cars; that such action would effect unjust discrimination; and that the cancellation, if permitted, will, in effect, unjustifiably increase the rates, since when the dunnage allowance was first established due and full consideration was given to the measure of the rates themselves, which were thus indirectly reduced.

As has been indicated, the allowance on traffic in closed cars to the southwest is of comparatively recent origin, and the same thing is true as to western classification territory in general. The record indicates that the carriers in these sections are not all of the same mind with respect to the propriety of or the necessity for granting such an allowance, and exhibits were filed from which it appears that in various parts of the country, as to the several classifications and exceptions thereto, agency tariffs and tariffs of individual roads there are many differing practices, some making an allowance of 500 to 1,000 pounds on traffic in both open and closed cars, some as to open cars only, others as to closed cars only, and still others making no allowance. We agree with the views expressed by the opposing interests in this case — that uniformity is much to be desired and should be accomplished — but we can here deal only with the schedules under suspension, and the question is upon the propriety and lawfulness of the proposition to require shippers to pay freight charges on basis of the rate for the commodity shipped on the full weight of the dunnage materials furnished by them and installed at their expense.

As to the tariffs dealt with in this proceeding, there is no provision for boxing or crating of automobiles, and it was testified that in this territory they have never been shipped in boxes or crates. Ratings for certain automobile parts in boxes, crates, or packages have been provided for, and respondents show that on application of the manufacturers these requirements have, in some instances, been waived, while in others the elimination of the boxing or crating provision was refused. Agricultural implements are shipped partly inclosed; that is, with sharp points and more fragile parts protected, but otherwise are loaded in bulk, dependence being placed upon the blocks, braces, supports, and other dunnage to safeguard the goods. Wire rope and cables are ordinarily wound on reels or spools, which can not be loaded flat, but must be placed upright and held in position with blocks and braces. The reels or spools frequently weigh from 6,000 to 20,000 pounds each and are susceptible of little damage to themselves, but would cause serious injury to other goods or to the carrier's equipment and property if permitted to shift in the cars. For starch, shipped ordinarily in boxes, barrels, or bags, the only dunnage required, except for door slats or shields, is in instances where the load extends above the lining of the car and it is necessary to install additional lining to prevent the top tiers

from shifting from side to side. Lard pails are permitted to be shipped loose, protected by bulkheads or crating. Those referred to in testimony vary in size from 5 pounds to 50 pounds, and owing to their shape can not be nested. Other kinds of tin cans can be nested or are crated and load more heavily. Respondents cite many instances in which the classification has been amended to permit of bulk shipping in order to eliminate the cost of boxes, crates, or other packing, and refer to similar applications now pending. For example, pianos, which formerly required expensive boxes, will now be accepted unboxed if harnessed in the car; acids and chemicals in carboys are permitted to be shipped with the necks of the carboys protruding above the tiers instead of completely boxed or covered; certain kinds of expensive brick and earthenware and stoneware are received packed in bulk in straw with partitions or bracing; bakery goods in cartons and cans may now, as the result of requests of the large bakery interests, be loaded in bulk, the shipper bulkheading or bracing the goods in the car, whereas formerly boxing or crating was necessary. It is not contended that as to all of the industries represented by protestants the acceptance of shipments loose, or without boxes, crates, or other containers, is a reversal of a previous practice, or that the dunnage actually takes the place of some other packing material which was formerly used, but it is insisted that the practice of dunning shipments is, in effect, a substitute for other shipping practices which are more expensive to the shipper, but are attended with less risk and expense to the carrier, and this is clearly established by several illustrations furnished by the opposing parties, which we deem it unnecessary here to set forth.

The testimony offered by the automobile interests concerns more especially the smaller types of machines which can be and are shipped double decked in the cars, the shipper furnishing and installing the double decks and other necessary materials for bracing, the expense of which and the freight charges on which are assessed against the consignee, and, presumably, are eventually paid by the consumer. The use of double decks and attendant dunnage is, according to the testimony, less expensive for the shipper than complete boxing or crating or than the use of two cars. The track, platform, and loading facilities of the shippers would be inadequate for their needs were double decking discontinued, thus rendering necessary the loading of a largely increased number of single-deck cars. Serious car shortages

have been experienced in the past, even with this method of conserving the car supply, and protestants are of the opinion that if their requirements in this respect were augmented by discarding double decks the shortages would cripple their business. It is alleged that the boxing or crating of automobiles would, owing to the enormous output of the present day, be impracticable; that shipments so made would be cumbersome and unwieldy; and that there would result a great economic waste. It is not denied, however, that export shipments of automobiles are so packed.

The loading of agricultural implements, as disclosed by exhibits introduced, is scientifically done. Much of the dunnage doubtless is designed to increase the weight of the load or to separate the lots for partial loading or unloading, and it is contended as to this commodity, as well as to automobiles and other articles enumerated, that only by the use of dunnage and racking can the cars be made to hold the minimum loads prescribed by the tariffs or classifications. Agricultural implements are completely boxed for export trade, but it is stated that their bulk and weight would preclude such packing of domestic shipments, which frequently have to be handled to and from cars by one man or two men.

Respondents assert that it is the lawful right of the carrier to refuse to accept for transportation goods which are not properly packed or which are not offered in such secure and safe form as to protect them against damage or prevent injury to the equipment. Protestants, however, relying upon the provisions of section 1 of the act, deny that any such right exists. As to this it may be said that the authorities generally have recognized that it is not only the right but the duty of the carrier to decline shipments which are not so prepared or packed as to render them safe for transportation, and to establish reasonable rules and practices in this respect. In *Davies v. L. & N. R. R. Co.*, 18 I. C. C., 540, the defendants provided in their tariffs for the loading of fruits and vegetables and the supplying and placing of dunnage and braces at their expense, assessing against the shipper or consignee the actual expense of material and labor. The contention that it was the defendants' duty to load, strip, and brace carload shipments at their own expense was held by us to be untenable, and we said at page 543:

"The service of loading, furnishing material, and placing in the cars is an additional service over and above the transpor-

tation for which carriers are entitled to receive reasonable compensation."

Risk is one of the elements entering into the present day rate fabric, and innumerable classifications and tariffs throughout the country contain packing and shipping requirements which can have no other justification than the right of the carrier to require the use of substantial and suitable containers and the elimination of hazard by the secure staying of unpacked articles. Carriers are obligated to furnish suitable cars and to receive and transport goods tendered to them in safe shipping condition, but are not obligated to prepare shipments for transportation. Standard box, stock, ventilated, and refrigerator cars in good repair will accommodate all of the ordinary and usual needs of shippers, and if more than this is demanded because of the form, nature, or peculiar characteristics of goods tendered for conveyance some obligation must attach to the shipper in connection with the additional demand. In *National Lumber Dealers' Asso. v. A. C. L. R. R. Co.*, 14 I. C. C., 154, 160, we said:

"Ever since the inception of railroad transportation shippers have, generally speaking, loaded and their consignees have unloaded carload freight. This practice or custom arose naturally because it was the easiest, most economical, and satisfactory way of doing the business. It is practically out of the question for railroads to provide men to load and unload carload freight at all points in the country. The shipper can load more satisfactorily and economically than anyone else. He is able to possess himself of effective appliances, where they can be used, and to employ skilled men to properly load all carload traffic, whether shipped in closed or on open cars. For the same reasons consignees are the best fitted to unload shipments. For more than fifty years the loading by consignor and unloading by consignee has been a recognized rule of carload transportation, and this rule extends to and includes commodities which yield to carriers the larger part of their revenue. With this custom, and as properly a part of it, there has always existed another custom, which is that shippers are required to secure loads for safe carriage. Because the shipper does the loading he is best situated to fasten the load upon the car. He has the facilities and men at hand and can do the work more satisfactorily and economically than anyone else."

See also the so-called *Precooling case*, *A. T. & S. F. Ry. Co. v. United States*, 232 U. S., 199, and *Southwestern Missouri Millers' Club v. St. L. & S. F. R. R. Co.*, 26 I. C. C., 245, 251.

We have in several instances approved of tariff provisions for additional reasonable charges for loading and unloading when done by the carrier. For such services and all other special services performed by it apart from conveyance, we think the carrier may properly make a reasonable charge, since in our view they are not accessorial parts of the transportation which section 1 requires the carrier to furnish. If the placing of blocks, braces, supports, and like materials in lieu of packing, crating, or boxing of individual units of carload shipments is essential for the safe transportation of the loads, the materials should be furnished and placed by the shipper. Can it be said, however, that having supplied and installed the requisite dunnage, the shipper may lawfully and should equitably be charged, either in part or in full, for the conveyance thereof at the rates charged for the commodity shipped? There can be no doubt on this record that the primary and most important purpose of the dunnage used in varying forms by the shipping interests here represented is to make the load safe for transportation and to obviate injury to the goods, the prevention of damage to the carriers' equipment or property being a minor consideration. Under these circumstances and in view of the fact that the substitution of dunnage for the more expensive boxes and crates and other packing material in respect of most of the commodities discussed is of advantage to the shipper and reduces the gross weight upon which freight charges must be paid, we think it not inconsistent that the carriers should receive revenue for the total weight hauled. Necessarily the effect of the cancellation of the allowance will be felt by many other shippers and branches of industry than those represented by protestants, but these, as dealt with of record, suggest no cogent reason for a view contrary to that expressed. In various ways carriers throughout the country in their tariffs provide for transportation free, or with appropriate allowance, of ice and stoves and linings with perishable freight; hay, straw, and sawdust with beer, eggs, vegetables, and fruit; salt with salt meats; and feed and attendants with live stock, poultry, and other like articles. These, however, which are mainly in the nature of measures looking to the preservation of the freight, are the outgrowth of peculiar conditions and are not to be identified with the issues now before us. We have uniformly approved of open-car allowances for standards, stakes, strips, blocks, and braces, and in several cases have held 500 pounds to be a reasonable allowance. In the case entitled *In the Matter of the Suspension*

of *Western Classification No. 51*, 25 I. C. C., 442, disposing of proposition to cancel the 500 pounds open-car allowance in the western classification, we said, at page 494:

"It is pointed out that materials embraced in dunnage cost money to the shipper and that they are generally lost or wasted with a single use, and therefore have no salvage value. It is also argued that these materials perform a service for the carrier, in that they make shipments more secure and to that extent reduce damage claims. It is also suggested that a discontinuance of the dunnage allowance will inevitably have a tendency on the part of shippers to reduce the weight of the materials thus used and consequently lessen the security of the shipments. We think there is much force in all of these arguments. It is unquestionably true that many of the expenses for dunnage are due to the inability of the carrier to furnish the kind of car desired by the shipper, and, rather than wait longer for the car he wants, he accepts the less desirable car, which he can get, and goes to the expense of fitting it. In this manner the shipper really contributes a part of the equipment which it is the duty of the carrier to furnish.

As an argument against the allowance for dunnage it is pointed out that shippers of other freight must pay freight on the weight of materials used in crating or boxing and in this manner they are being unjustly discriminated against. There is some force in this argument, but it seems to us that it is completely overshadowed by the other considerations which have been suggested. As a matter of sound public policy, as well as in the interests, in the long run, of both shipper and carrier, we think that the allowance of 500 pounds should be continued."

The views thus expressed still have full force and effect with respect to open cars, but they were not intended to define the reasonable practice to govern shipments in closed cars. It is true that boxes, crates, and similar packing materials constitute integral parts of the shipments they inclose, are often taken possession of by the consignee and may be put to further use, and hence have in some instances a further market value, while dunnage materials in both open and closed cars are generally discarded or lost, and thus wasted with a single use, but we are not convinced that the discontinuance of the allowance on traffic in closed cars will tend to lessen the amount or weight of the materials used for that purpose, and therefore to lessen the security of the shipment. If shippers elect to dispense with the use of boxes,

crates, and other packing which might be available for further use and upon the full weight of which the carriers would receive freight charges, we think the carrier offering equipment which would otherwise adequately take care of the shipment is entitled to revenue for the gross weight transported. The testimony here is that safety of load is of first importance, some shippers having used dunnage to such an extent as to elicit complaints from consignee against whom freight charges are assessed, while others have always used the smallest practicable amount; that an allowance for the full amount of dunnage used in lieu of a maximum of 500 pounds would not tend to safer loading, the present methods, especially as to the automobile trade, being preferred, and, conversely, that with the withdrawal of the present allowance it would still be to the interest of the shipper to provide ample protection, as is true with less-than-carload shipments which are not subject to any allowance.

If, as was stated in the *Western Classification case*, *supra* —

“Many of the expenses for dunnage are due to the inability of the carrier to furnish the kind of car desired by the shipper, and, rather than wait longer for the car he wants, he accepts the less desirable car, which he can get, and goes to the expense of fitting it,” it follows that when the more desirable car, i. e., box, stock, or other closed car, is furnished no expense of fitting needs to be incurred except in consequence of conditions for which the carrier is not answerable, and it is optional with shippers to order and make use of the type of car best adapted to their needs. It is well known that the general run of the articles shipped on open cars, and subject to allowances for stakes, braces, supports, etc., such as lumber, poles, pipe, and similar freight, would not remain on the cars and could not be safely hauled unless so secured; but that contrariwise, little, if any, dunnage is required for such freight in closed cars. It is also well understood that the tare weight of the flat car, or gondola, is materially less than that of the built-up closed car, and therefore that the former is less expensive to haul.

That the establishment of the dunnage allowance effected a reduction in the total freight charges payable by shippers or consignees, and that its discontinuance will result in an increase in the total charges is obvious, but none of the respondents' rates are under suspension in this proceeding, and if the proposed change of practice is justified, respondents will have sustained the burden cast upon them by the statute.

Not all discrimination is unlawful, and neither the fact that in the event the cancellation is permitted shipments in closed cars to the territory covered by the schedules in controversy will be excluded from the benefit of the allowance for dunnage, while traffic in other territories served by respondents and by other carriers will have such benefit, nor the fact that traffic in closed cars will be subjected to different treatment than traffic in open cars, which, as we have seen, is clearly differentiated, can on the evidence submitted be held to effect such discrimination as is forbidden by the statute.

The International Harvester Company of America ships certain small thrashers, corn huskers, and shredders in closed cars which come in competition with larger machines utilized for the same purpose, which are shipped by other manufacturers in open cars, and it was contended that the shipper of the smaller machines would be subjected to unjust discrimination by the withdrawal of the closed-car allowance. The record, however, suggests no reason why, if the shipper so elects, open cars can not be ordered and employed for the shipment of the small machines, nor does it indicate that the use of the open car by the shipper of the large machines is the result of anything else than the shipper's preference.

To the question of minimum weights the several protestants give considerable attention, and it is sought to show that dunnage must of necessity be used to enable them to load to the minimum. The minimum weights on automobiles, it is said, were fixed when this industry was in its infancy, and have never been changed, notwithstanding the fact that the factories are now turning out machines of larger types and dimensions. If it be true that there is need for modification of the existing minimum weights on this and other commodities with respect to the territory involved, or that, contrary to the Commission's numerous expressions, the tariff minimum weights are in excess of the capacity of the equipment, or in excess of what can ordinarily be loaded, and, consequently, unreasonable, proceedings may be instituted looking to the application of the necessary remedy. We think it unsound in principle, however, to encourage car fitting or the use of dunnage in order to secure minimum loads, and to approve of the payment of allowances to offset expenses thus incurred. Even if it be established that dunnage must be employed to secure minimum carloads of some commodities, that fact can not be accepted as imposing upon carriers the obligation to continue the maintenance of a general rule for the payment of dunnage allowances on

all freight in closed cars. The use of dunnage to enable heavy loading, or for the purpose of securing maximum loads and the use of fewer cars, is quite another proposition. The advantages of such practices are mutual, and apparently weigh as heavily in favor of the shipper as of the carrier. It is our conclusion that respondents have adequately borne the burden cast upon them, and that the cancellation should be permitted to become effective. The order of suspension will be vacated.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY v. HARDWICK FARMERS ELEVATOR
COMPANY.

226 U. S. 426, (1913):¹

The Minnesota Reciprocal Demurrage (Laws of Minnesota, 1907, chapter 103) penalized the failure of a railway company to deliver cars at terminals and intermediate points on its line within certain periods, respectively, after demand by shipper. In this case cars were demanded for interstate traffic. Upon failure to make deliveries suit was brought for penalties under the statute. The action was tried before a jury. The trial court refused to give instructions asked for by the railway company attacking the constitutionality of the act. Verdict for the plaintiff was entered on the judgment, which was affirmed by the State Superior Court. 110 Minnesota, 25.

Mr. M. V. Seymour, with whom *Mr. Edward C. Stringer* and *Mr. Edward S. Stringer* were on the brief, for plaintiff in error.

Mr. C. H. Christopherson for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The argument at bar has been primarily concerned with the question of the validity of the Minnesota statute, considered as having been enacted in the exercise of a power assumed to exist to legislate reasonably in the absence of action by Congress on the subject of the delivery when called for, of cars to be used in interstate traffic. Thus counsel for the defendant in error urges the correctness of the action of the Supreme Court of Minnesota in

¹ An abbreviated statement of facts is here given. — Ed.

sustaining the statute upon the hypothesis that Congress had not legislated on the subject and that the act was a reasonable exertion of the power of the State. On the contrary, on behalf of the Railroad Company it is insisted that even upon the assumption that the State had power to deal with the subject for which the statute provides in the absence of legislation by Congress, the enactment is nevertheless void, since it but expresses a policy which by penalization, fines and forfeitures will substitute for a free and unrestrained flow of commerce a service favoring a particular locality and shippers within the confines of one State, to the disadvantage of others. We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning the deliveries of cars in interstate commerce by carriers subject to the act.

In the original act to regulate commerce the term "transportation" was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn Act it was declared that the term transportation (*italics ours*) — "shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; *and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.*"

The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement § 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections "shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the Act to Regulate Commerce give remedies for the

violation of that duty. Thus, by § 8 it is provided "That in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." Further by § 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by § 10 it is made a criminal offense for an employé of a corporation carrier to "wilfully omit or fail to do any act, matter, or thing in this act required to be done."

As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power. *Southern Ry. Co. v. Reid*, 222 U. S. 424.

The judgment of the Supreme Court of Minnesota must therefore be reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Judgment reversed.*¹

¹ To the same effect, *Hampton, v. St. Louis and Iron Mt. S. Ry. Co.* 227 U. S. 456. It is also now beyond the power of a state to require carriers to give notice of arrival of shipments so far as the statute affects commerce among the states. *St. Louis Iron Mt. S. Ry. Co. v. Edwards*, 227 U. S. 265.—Ed.

SOUTHERN RAILWAY COMPANY v. REID.

222 U. S. 424 (1912).

The facts are stated in the opinion.

Mr. Alfred P. Thom, with whom Mr. John K. Graves was on the brief, for plaintiff in error in this case and in No. 80 argued simultaneously herewith [*Southern Railway v. Reid & Beam*, 222 U. S. 444].

Mr. Plummer Stewart and Mr. Jno. A. McRae for defendants in error in the case and in No. 80 argued simultaneously herewith [*Southern Railway v. Reid & Beam*, *supra*].

MR. JUSTICE MCKENNA delivered the opinion of the court.

State
statute

The question in the case is the validity of an act of the State of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting \$50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained.¹

Defendants in error brought suit against plaintiff in error, herein called the railway company, in one of the courts of North Carolina, to recover penalties and damages for the failure of the railway company, in violation of the statute, on dates from Sep-

¹ Agents or other officers of railroads and other transportation companies whose duty it is to receive freight shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day said company refuses to receive said shipment of freight, and all damages actually sustained by reason of the refusal to receive freight. If such loaded car be tendered at any siding or warehouse at which there is no agent, notice shall be given to an agent at the nearest regular station at which there is an agent that such car is loaded and ready for shipment. (Code of North Carolina, 1905, sec. 2631.)

tember 17 to September 23, 1907, to receive goods tendered to it by Etta C. Reid, defendant in error, at Charlotte, North Carolina, for transportation to a point in the State of West Virginia.

The material facts, as stipulated, are as follows: The railway company is a Virginia corporation, and is a common carrier, and operates a line of railroad from the city of Charlotte to the city of Alexandria, Virginia, and another line to the city of Richmond. Davis is a town in West Virginia, and a terminus of a branch road of the Western Maryland Railroad Company, six miles long, running from a point on the railroad, known as Thomas, to Davis.

The railway company operates no line of railroad or other means of conveyance to Davis, nor does it connect with the Western Maryland Railroad's line.

On the seventeenth of September, 1907, Etta C. Reid tendered to the railway company at its depot in Charlotte, where it usually accepts freight, a lot of household goods and kitchen furniture and offered to pay the freight charges thereon. She demanded that the company issue to her a bill of lading "reading from Charlotte, in the State of North Carolina, to Davis, in the State of West Virginia, consignee to be Samuel Hammock." The railway company declined to name a rate to be charged for the transportation of the goods, declined to permit her to prepay the freight charges from Charlotte to Davis, declined to receive the goods for shipment, and declined to issue a bill of lading therefor.

She renewed her request on four successive days, and, with each demand, the company refused to comply. On September 23, 1907, the company named the sum of \$34.08 as the amount necessary to prepay the freight charges on the shipment from Charlotte to Davis, and thereupon she paid the said sum and the company issued a bill of lading to her.

On September 17, 1907, no through and joint rate of freight had been established by the railway company and the Western Maryland Railroad Company and other roads which the shipment would have to pass over going from Charlotte to Davis, "and no such rates had been filed with the Interstate Commerce Commission and no rate of freight had been established or filed with the Interstate Commerce Commission, or published, covering shipments between said points." On that day, when Etta C. Reid made her demand of the railway company, the company's agent advised her that there was no established rate for the shipment, that no rate had been filed or published, that he did not

know the rate, that he had no authority to receive the goods or the freight charges thereon to destination and no authority to issue a bill of lading reading "final destination, Davis, in the State of West Virginia."

The agent wired the officer having charge of such matters to obtain authority to name a through and joint rate, to receive the shipment and issue a bill of lading. Immediately thereafter the officers of the company took up with the officers of the companies over whose lines the shipment of freight would have to move the establishment of a rate, with the result that a rate was established. On Monday, September 23, 1907, the local agent was informed of such rate and given authority to receive the shipment and to issue a bill of lading. Thereupon the company received the shipment, accepted the amount of freight in accordance with the joint and through rate, and issued the bill of lading.

There is, and was at the date of the tender of the goods, a telegraph office at Davis. Mrs. Reid remained at Charlotte for the time mentioned awaiting the establishment of the rate.

It is stipulated that she was damaged in the sum of \$25, for the recovery of which and the penalties prescribed by the statute she asked the court to adjudge.

The railway company resisted the demand and contended that to hold that the act was applicable to it would violate the commerce clause of the Constitution of the United States.

Judgment was awarded to defendants in error as prayed, and it was affirmed by the Supreme Court of the State, two members of the court dissenting. 153 No. Car. 490.

This statement indicates the questions which are presented for solution and the principles upon which the solution of them depends. It hardly needs to be stated that transportation of property between the States is interstate commerce, and may be of Federal rather than of state jurisdiction. We say may be of Federal jurisdiction, for interstate commerce in its practical conduct has many incidents having varying degrees of connection with it and effect upon it over which the State may have some power. As to the extent of the power and the occasions for its exercise, controversies have arisen, and in deciding which the power of the State over the general subject of commerce has been divided into three classes: First, those in which the power of the State is exclusive; second, those in which the States may act in the absence of legislation by Congress; third, those in which

*State or Nat'l
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commerce*

the action of Congress is exclusive and the State cannot act at all. *Covington &c. Bridge Co. v. Kentucky*, 154 U. S. 204, 209; *Western Union Telegraph Co. v. James*, 162 U. S. 650, 655.

These divisions, however, express but the extreme boundaries of the subject. Something more definite is necessary for the decision of the opposing contentions in the case at bar. The Supreme Court of the State was of the view that the statute simply regulated a duty which preceded the entry of the goods in interstate commerce, and concluded, therefore, that the statute was "neither an interference with nor a burden upon interstate commerce." And it decided that the execution of this duty was not precluded by the provision of the Interstate Commerce Act requiring a schedule of tariffs to be established and charged. It was said by the court that it was the duty of the railway company to file such schedule, and that the company could not justify the violation of its common law duty by the neglect of its statutory duty.

The case, however, is not quite in such narrow compass. There is something more to be considered than the accumulation of defaults, if there be defaults. It is undoubtedly the duty of a railway company to receive freight when tendered for transportation. It may, besides, have other obligations, but it does not follow that it is within the power of the State to enforce them. There may be a Federal exertion of authority which takes from a State the power to regulate the duties of interstate carriers or to provide remedies for their violation. This is realized by defendants in error, and they assert that the state statute is in aid of commerce, and not an interference with or burden upon it, and therefore must be sustained as a valid exercise of the State's power, citing *Atlantic Coast Line R. R. Co. v. Mazursky*, 216 U. S. 122; *Western Union Tel. Co. v. James*, 162 U. S. 650.

In those cases, and in the later case of *Western Union Tel. Co. v. Milling Co.*, 218 U. S. 406, the principle is expressed that "there are many occasions where the police power of the State can be properly exercised to insure a faithful and prompt performance of duty within the limits of the State upon the part of those engaged in interstate commerce." Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it. But the facts of those cases distinguish them from the case at bar, and make their principle inapplicable. In the Telegraph Company cases there was a failure to transmit or deliver telegrams, in violation of the duty

so to do imposed by the particular state statutes. In the railroad case a statute of the State of South Carolina which required carriers to settle within a specified time claims for loss of or damages to freight while in their possession within the State was sustained against the objection that it was an interference with interstate commerce. In none of the cases, however, was there any Federal legislation upon the subject involved, and in all of them such circumstance was stated as an element of decision. The circumstance is important, and we are brought to the inquiry whether it exists in the present case.

It is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised. The question occurs: To what extent and how directly must it be exercised to have such effect? It was decided in *Missouri Pacific Railway Co. v. Larabee Mills*, 211 U. S. 612, that the mere creation of the Interstate Commerce Commission and the grant to it of a large measure of control over interstate commerce does not, in the absence of action by it, change the rule that Congress by nonaction leaves power in the States over merely incidental matters. "In other words," and we quote from the opinion (p. 623), "the mere grant by Congress to the commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. . . . Until specific action by Congress or the commission the control of the State over those incidental matters remains undisturbed." The duty which was enforced in the state court was the duty of a railroad company engaged in interstate commerce to afford equal local switching service to its shippers, notwithstanding the cars concerning which the service was claimed were eventually to be engaged in interstate commerce. This duty was declared (p. 624) to be a common law duty which the State might, "at least in the absence of Congressional action, compel a carrier to discharge."

The principle of that case, therefore, requires us to find specific action either by Congress in the Interstate Commerce Act or by the Commission covering the matters which the statute of North Carolina attempts to regulate. There is no contention that the Commission has acted, so we must look to the act. Does it, as contended by plaintiff in error, take control of the subject-matter and impose affirmative duties upon the carriers which the State

cannot even supplement? In other words, has Congress taken possession of the field? . . .

It is evident, therefore, that Congress has taken control of the subject of rate making and charging. All of the particular details we cannot set forth without extensive quotation from the act, which it is quite inconvenient to make. The provisions of the act are directed at the abuses most to be feared, unreasonableness in the rates and discriminations, including in the latter discriminations in service, in the acceptance and delivery of freight and facilities furnished. . . .

There is scarcely a detail of regulation which is omitted to secure the purpose to which the Interstate Commerce Act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of. We are, therefore, brought to consider what the statute of North Carolina provides. Leaving out qualifications with which we are not concerned, the act requires railroad companies to receive freight for transportation whenever tendered at a regular station and forward the same over the route selected by the person offering the shipment. Fifty dollars a day is the penalty prescribed for refusal, and all the damages incurred.

The particular act which was held to violate the statute was refusing the tender of goods for shipment from Charlotte, North Carolina, to Davis, West Virginia, that is, a tender for interstate shipment, and a demand coincidentally for a bill of lading covering the shipment explicitly stating the origin of the shipment at Charlotte and its destination at Davis. The Supreme Court of the State decided, as we have seen, that the statute deals with a common law duty simply, one which attaches before freight enters into interstate commerce, and hence concluded as follows: "The statutory enforcement under penalty of the common law duty to accept freight 'whenever tendered' is not within the scope or terms of any act of Congress. It is neither an interference with nor a burden upon interstate commerce." We are unable to agree with the conclusion. It would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co. v. Mayes*, 201 U. S. 321. In the term "transportation," we have seen, Congress has included "all services in connection with the receipt . . . of property transported" And this certainly imposes the obligation to receive the property

as well as to carry it, one of the obligations the carrier must perform "upon reasonable request therefor." Other provisions of the same import and direction might be quoted. Conditions put on the receipt of articles at the railroad station may be conditions upon the traffic, and necessarily are within the regulating power of Congress. Their inducement and aim may be to secure a prompter performance of duty by the carrier, and so far beneficent. But that is not the question. The question is, Where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a "through route," must be established, filed and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See *Robinson v. B. & O. R. R. Co.* (appears in next number). By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

We cannot assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to "engage or participate in the transportation of passengers or property" until they had fixed and proclaimed the rate to be charged therefor — a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: If the carrier obey the state law, he

~~incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law.~~ Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved and there is given to the States the power which is the States' and to Congress the power which belongs to Congress.

But if there be a middle ground, it certainly can be argued that the cases establish that it is passed when the state regulation burdens interstate commerce, and whether a regulation has such effect may be determined by its sanctions. If a penalty of \$50 for refusing to receive freight "when tendered" be no burden on interstate commerce beyond the power of a State to impose, would a penalty of \$100 or \$1,000 likewise be no burden? May not the power which is competent to impose a penalty select its amount? The penalty of the North Carolina statute, it is to be remembered, is independent of the damage received, and what excuses or defenses may be offered the decisions of the court leave in doubt. The statute seems to permit none. The case at bar illustrates somewhat its peremptory character, and the case which was argued with this (*Southern Railway Company v. Reid and Beam*, *post*, p. 444), still more so. The plaintiffs in that action sued for \$750 for refusal to receive and forward a carload of shingles and recovered \$350, although one of them testified that they "never lost a cent." The circumstance was declared by the court, citing a prior case, to be immaterial, as the penalties were "not given wholly on the idea of making pecuniary compensation to the party injured, but usually for the more important purpose of enforcing the performance of a duty required by public policy or positive statutory enactment." The policy of the statute, then, is to require the acceptance of freight "when tendered," with daily accumulating penalties upon refusal to do so. If such power be conceded, what is the limit of its exercise, either as to conditions or penalties?

One other contention remains to be noticed. It is said that there is not presented in the case the dilemma of alternative penalties, for the Hepburn Act, it is pointed out, requires a schedule of rates to be filed only "when the through route and joint rate have been established," and that none were established in the case at bar and that, therefore, the railway company was not put to a choice of obligations and subjected to punishment how-

ever it might choose. But it is also provided that "if no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation." There is nothing in the record to show that there were such established separate rates and that separately established rates were published and kept open for inspection. Indeed, the record shows that a through rate had to be fixed by the several carriers in the through route.

It was only because of the obligation imposed by the Hepburn Act that the railway company refused to receive the goods tendered to it and the agent of the company informed defendant in error that he was without power to comply with her demand. He promptly acted in the matter when the lines over which the freight had to pass established a joint rate. He then received the goods, issued a bill of lading therefor, "and the shipment went forward to its destination."

*The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.*¹

INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS
CENTRAL RAILROAD COMPANY.

215 U. S. 452 (1910).

The facts are stated in the opinion.

Mr. Wade H. Ellis, Assistant to the Attorney General, and *Mr. Luther M. Walter*, Special Assistant to the Attorney General, with whom *Mr. L. A. Shaver* and *Mr. H. B. Arnold* were on the brief, for appellant.

Mr. Eldon J. Cassoday, and *Mr. Rush C. Butler* for Receivers of the Illinois Collieries Company submitted a brief by leave of the court.

By leave of the court, *Mr. Francis I. Gowen*, and *Messrs. Wayne MacVeagh*, *McKenney* and *Flannery* filed a brief on behalf of the Pennsylvania Railroad Company.

¹ *Southern Railway Co. v. Reid & Beam*, 222 U. S. 444, *Southern Railway Co. v. Burlington Lumber Co.*, 225 U. S. 99, *accord.* — *Ed.*

MR. JUSTICE WHITE delivered the opinion of the court.

Whether a duty rested upon the Illinois Central Railroad Company to obey an order made by the Interstate Commerce Commission is the question here to be decided.

On the ground that preferences were created and discriminations engendered by regulations established by the railroad company concerning the daily distribution of coal cars to mines along its line in periods when the supply of such cars was inadequate to meet the demand upon it for the movement of coal, the order in question commanded the railroad company to desist from enforcing the regulations found to be preferential, and for a future period of two years to deliver cars to mines along its line in conformity with the rule announced by the commission.

A clearer perception of the questions to be considered will be afforded by giving a brief statement of the cause of car shortage referred to, accompanied with a mere outline of the steps generally taken by carriers to deal with the subject and the particular method applied by the Illinois Central Railroad Company prior to the date when the complaint was made against it, concerning which the order previously referred to was entered.

It is conceded in argument that bituminous coal mines, which are the character of mines here involved, must dispose of their product as soon as the coal is delivered at the surface, as it is not practicable for an operator to store such coal, and the amount that a mine will produce is therefore directly dependent upon the quantity that can be taken away day by day. As a result of this situation it is also conceded that railroads upon whose lines coal mines are situated pursue a system by which daily deliveries of cars, based upon requisitions of the respective mines, are made to such mines to permit of the removal of their available output for that day.

Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because among other things, *a*, of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; *b*, the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an

extensive area; and, c, because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points to be sold after arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage or as an instrument for delivery, without the expense of breaking bulk, to other and distant points.

It is disclosed that the railroads of the United States generally, at various times, put in force regulations for the distribution of coal cars. Generally speaking, these regulations provide for fixing the capacity of coal mines in order to determine the number of cars to which each might normally be entitled to daily move its output of coal. And these regulations also provide for a method of determining the *pro rata* share of the cars daily allotted for distribution in times of car shortage. Neither the method by which capacity was to be ascertained nor the regulation for daily distribution upon the basis of such capacity in case of shortage was identical among the various railroad systems of the United States. The divergence, and even conflict, between those systems is illustrated by the cases of *Logan Coal Co. v. Pennsylvania R. R. Co.*, 154 Fed. Rep. 497; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co.*, 165 Fed. Rep. 113; cases cited at pages 503 and 504 of the report of the Logan Coal Co. case, and the case of *Majestic Coal & Coke Co. v. Illinois Central R. R. Co.*, 162 Fed. Rep. 810.

In a general sense, however, all the regulations of the various railroads, either for ascertaining the capacity of coal mines or in order to determine the *pro rata* share for daily distribution of cars to the respective mines in case of shortage dealt with four classes of cars: 1, system cars, that is, cars owned by the carrier and in use for the transportation of coal; 2, company fuel cars, that is, cars belonging to the company and used by it when necessary for the movement of coal from the mines on its own line, and which coal had been bought by the carrier and was used solely for its own fuel purposes; 3, private cars, that is, cars either owned by coal mining companies or shippers or consumers, and used for the benefit of their owners in conveying coal from the mines to designated points of delivery; 4, foreign railway

fuel cars, that is, cars owned by other railroad companies and which were by them delivered to the carriers on whose lines mines were situated, for the purpose of enabling the cars to be loaded with coal and returned to the company by whom the cars had been furnished, the coal being intended for use as fuel by such foreign railroad companies.

1. The various regulations, irrespective of minor differences between them, fell upon one or the other side of this broad line of division. One system took into account class 2, the fuel cars of the carrier, class 3, the private cars, and class 4, the cars of foreign railroads, and deducted from the rated capacity of the mine the sum of coal delivered by that mine in such cars, and upon the basis thus resulting apportioned ratably in case of shortage the system cars, that is, those embraced in class 1. On the other hand the other class of regulation not only took no account of the cars in classes 2, 3 and 4, as a means of rating the capacity of the mine, but moreover did not charge against any mine, for the purpose of ascertaining the daily *pro rata* of the cars to which such mine was entitled, any car whatever furnished such mine on such day embraced within classes 2, 3 and 4, that is, any company fuel car, foreign railway fuel car or private car. By this system, therefore, where a mine was entitled daily to a given *pro rata* of the cars subject to general distribution it received its full share of such cars, and in addition on that day also received such of the company fuel cars, foreign railway fuel cars and private cars as might have been sent to it for loading on that day. This absolute disregard in the allotment of the company fuel cars, foreign railway fuel cars and private cars was not in all respects common to all the systems which took no account of such cars in fixing capacity, since in some of the regulations one or the other of the classes was taken into account in fixing the *pro rata* for distribution.

2. Previous to 1907 the Railroad Commission of the State of Ohio filed with the Interstate Commerce Commission two complaints against the Hocking Valley and another railroad company. These complaints were based upon the ground that the failure of the railroads in times of car shortage to include in the *pro rata* of cars for distribution foreign railway fuel cars and private cars, and to charge the mines which had received such cars with the same as part of their distributive share, created an undue preference and worked unjust discrimination in violation of the act to regulate commerce. On July 11, 1907, the report and opinion

of the commission was announced in the cases referred to. *R. R. Comm. of Ohio v. Hocking Val. Ry. Co.*, 12 I. C. C. Rep. 398. It was declared that the complaints were well founded, and the relief prayed was awarded. Nine days afterwards — presumptively in ignorance of the finding of the commission just referred to — the Illinois Central Railroad Company promulgated rules governing the distribution of cars to coal mines. Although by these rules foreign fuel cars, private cars and company fuel cars were not taken into account in ascertaining the capacity of a mine or mines, such cars were expressly directed not to be counted for the purpose of the daily distribution of cars among the respective mines. On August 15 following, however, presumably to cause the regulations to conform to the interpretation of the Interstate Commerce Act adopted by the commission in the Hocking Valley case, a circular was issued by the Illinois Central Railroad Company, to go into effect September 1, 1907, cancelling the circular of July 20, 1907, and directing that account should be taken in the distribution of cars to a particular mine or mines of both foreign railway fuel and private cars. Before the date fixed for the going into effect of this last-named circular the Majestic Coal and Coke Company, a West Virginia corporation, filed a suit against the Illinois Central Railroad Company in the United States Circuit Court for the Northern District of Illinois, complaining that to charge against its distributive share of coal cars, in the event of a car shortage, the fuel cars and private cars furnished it would violate its legal rights. After hearing, a temporary injunction, preventing the going into effect of the regulations in the particulars mentioned, was issued. The distribution of coal cars thereafter continued to be made as provided in the prior circular.

With this prelude we come more immediately to the origin of the controversy before us.

On October 31, 1907, the Illinois Collieries Company filed with the Interstate Commerce Commission a complaint against the Illinois Central Railroad Company. The regulations of the railroad company as to the distribution of coal cars were assailed as unjustly discriminatory in violation of the act to regulate commerce, particularly as respected the practice of not taking into consideration foreign railway fuel cars and private cars in determining the distribution of coal cars among the various coal operators along the lines of the railroad on interstate shipments of coal. It appears that the complaint just referred to was heard

before the commission, with two other complaints against other railroads involving the same general subject. In its report, which was filed in all three of the cases on April 13, 1908, *Traer v. Chicago & Alton R. R. Co.*, 13 I. C. C. Rep. 451, the commission held that not to count in times of car shortage when the daily distributions were made against the mine receiving the same company fuel cars, foreign railway fuel cars and private cars was a violation of the act to regulate commerce. In announcing this conclusion reference was made to the previous opinion of the commission in the Hocking Valley case, *supra*, and it was declared that the Illinois Central Railroad Company on the hearing before the commission had conceded the controlling effect of the previous ruling of the commission. Considering the temporary injunction issued by the Circuit Court of the United States for the Northern District of Illinois, the commission declared that in view of the decision of this court in the case of the *Texas & Pacific Ry. Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, it was the duty of the commission to order the carrier to desist from the unlawful discrimination.

Although the complaint in the case of the Illinois Central Railroad Company differed from the complaints in the two other cases which were considered and passed upon by the commission at the same time, in that it did not assail the failure to take into account the company fuel cars in making distribution in times of car shortage, nevertheless the commission declared that the Illinois Central Railroad Company, both in its brief and argument, had conceded the importance of the subject to that company and had invoked the action of the commission thereon.

The order of the commission, as heretofore stated, therefore not only directed the desisting from the practice of failing to take into account the foreign railway fuel cars, private cars and the company fuel cars, but also required the carriers to establish regulations for a period of two years from July 1, 1908, providing for the counting of all such cars. The general scope of the order was, however, qualified by expressly authorizing a railroad company to deliver to a particular mine all the foreign railway fuel cars, the private cars and the company fuel cars consigned or assigned to said mine, even although the number thereof might exceed the *pro rata* share of the cars attributable to said mine when ascertained by taking into account all the cars which the order required to be considered. Where, however, the number of such cars was less than the *pro rata* share of the mine the order

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only permitted the carrier to add a sufficient number of system cars to make up the rightful *pro rata* number.

Being unwilling to comply with the order of the commission, the Illinois Central Railroad Company commenced the suit which is now before us to enjoin in all respects the enforcement of the order of the commission. It was averred that although the company was adequately equipped with coal cars and with sufficient motive power and operative forces, yet at times an inadequate supply of coal cars to meet the demand arose from the circumstances which we have previously stated. It was alleged that the regulations adopted by the company for ascertaining the capacity of the mines and for the distribution of cars were in all respects just and reasonable, and it was charged that the order of the commission, directing the taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive and unlawful, because it deprived the owners of such cars of the right to the use of their own property. It was further alleged that, as to the foreign railway fuel cars, the order was also unjust, unreasonable, oppressive and unlawful, because such cars constituted no part of the equipment of the road, and, failing to count them, could not constitute an unlawful discrimination or the giving of an unjust preference within the intendment of the act to regulate commerce. Besides charging that the order to count the company fuel cars was unjust, unreasonable, etc., it was averred that the attempt of the commission to deal with such cars was beyond its power, and was but an effort to deprive the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road. In addition, the proceedings in the suit brought by the Majestic Coal Company were set out, the granting of a temporary injunction therein as to counting foreign railway fuel cars and private cars was alleged, and it was charged that in any event, as to those two classes of cars, the order of the commission was not lawful, since it compelled the company to violate the injunction which was yet in force. The commission answered by asserting the validity in all respects of the order by it made, substantially upon the grounds which had been set out in its report and opinion announced when the order was made. All the averments in the complaint as to want of power were traversed and it was expressly charged that the subject of the distribution of coal cars as dealt with by the order was within the administrative power delegated to the commission by the terms of the act to regulate commerce. The

nature and character of the preferences and discriminations which had led the commission to conclude that unlawful discrimination and unjust preference arose from the failure to count the classes of cars referred to was alleged in subdivision XIV of the answer, a portion whereof is reproduced in the margin.¹ A certificate as to the public importance of the cause was filed by the Attorney General in compliance with §16 as amended by the act of June 29, 1906, 34 Stat. 584, c. 3591, and the cause was thereafter submitted at the same time with one brought by the

¹ XIV. Defendant avers that the allotment by complainant of said foreign railway fuel cars, private cars, and complainant's fuel cars to the mines receiving them in addition to the full distributive shares of such mines in the general distribution of cars by complainant and the failure by complainant to count and charge said foreign railway fuel cars, private cars, and company cars against the mines receiving them, in said general distribution, results in undue and unreasonable preference or advantage to the mines and operators receiving such cars and subjects the owners and operators of mines which do not receive such cars to undue and unreasonable prejudice and disadvantage in the following respects, to wit:

(a) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars thereby receives a higher percentage of cars than mines of equal capacity which do not receive such cars.

(b) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars may operate his mine to a fuller capacity and thereby reduce the cost of coal per ton, resulting in an increased profit on his commercial coal.

(c) That the operator receiving foreign railway fuel cars, private cars, or company fuel cars is enabled to increase the number of working places in the mine, is enabled to develop his mine more rapidly, is enabled to increase his capacity rating, and in future reratings of such mine by complainant for the purposes of car distribution the mine would receive a higher rating and consequently a larger number of cars in complainants' general distribution of cars.

(d) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of miners and laborers.

(e) That the development of the mines which do not receive the foreign railway fuel cars, private cars, or company fuel cars is retarded in inverse ratio as the development of the mines receiving said cars is accelerated.

(f) That by the arbitrary allotment of the foreign railway fuel cars, private cars, or company fuel cars the complainant and the so-called foreign railways are enabled to secure low prices on railway fuel because the operator receiving such cars is enabled to produce his commercial coal at much lower prices than do the mines which do not receive such arbitrary cars.

(g) That the operator of the mine receiving the foreign railway fuel cars, private cars, or company fuel cars is thereby enabled to make contracts for the delivery of coal distributed over a long period, to an extent that the operator of the mines which do not receive such cars cannot do.

Alton Railroad, involving a similar question, to a Circuit Court held by Judges Grosscup, Baker and Kohlsaat. A single opinion was announced in both cases. 173 Fed. Rep. 930. While deciding that the complainants were not entitled to relief in so far as the order of the commission concerned the counting of foreign railway fuel cars and private cars, it was yet held that the railway companies were entitled to an injunction restraining the enforcement of the orders of the commission in so far as they directed the taking into account of the cars employed by the company in hauling its own fuel. The conclusion on this latter subject was based upon the theory that, as the railroad companies took the coal which they bought for their own use from the tipples of a coal mine, and thereafter moved it for their own account and not for commercial purposes, the cars used for that purpose could not be treated as being engaged in commerce, as "commerce under these circumstances ends at the tipples." The court, however, observed:

"But this does not mean that these cars do not affect the problem of an equitable distribution of commercial equipment. The mine operators are objects of interest under the interstate commerce law, not as diggers of coal, but as shippers who tender a commercial product for transportation by interstate common carriers. The basis, therefore, on which the mines in a district should be rated is not their average output as a physical question, but the average output which they respectively tender for transportation in commerce."

And in accord with this reasoning it was in conclusion remarked that the complainants as to the cars used for hauling their fuel were entitled to an injunction "against their being compelled to take fuel cars into consideration except as a means in determining the true capacities of the mines to tender coal to them for transportation in commerce."

From the final decree enjoining the commission from enforcing its order, in so far as it directed the taking into account the company fuel cars in the distribution of coal cars in times of car shortage and in so far as it directed the future taking such cars into account, the Interstate Commerce Commission appeals. . . .

When coal is received from the tipples of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce. In changed form these propositions but embody the

reasoning which led the court below to its conclusion that, under the circumstances, commerce ended at the tippie of the mine. The deduction from the proposition is, as the movement of coal under the conditions stated is not commerce, it is therefore not within the authority delegated to the commission by the act of Congress, as all such acts have relation to the regulation of commerce, and do not, therefore, embrace that which is not commerce. It is to be observed, in passing, that if the proposition be well founded, it not only challenges the authority of the commission, but extends much further, and in effect denies the power of Congress to confer authority upon the commission over the subject. In all its aspects the proposition calls in question the construction given to the law by the commission in every case where the subject has been before it, and also assails the correctness of numerous decisions in the lower Federal courts, to which we have previously referred, where the subject, in various forms, was considered. It goes further than this, since it, in effect, seeks to avoid the fair inferences arising from the regulations adopted by the railroad company. Those regulations, in providing for the obligation of the railroad company to supply cars, and recognizing the duty of equality of treatment, found it necessary, by express provision, to provide that private cars, foreign railway cars and company fuel cars should not be counted against the mine on the day when furnished, thus implying that, under the general rule of equality, if not restricted, it was considered the duty would exist to consider such cars. The contention, moreover, conflicts with the rule which, as we have seen, obtains in other and great systems of railroad, by which, for the purpose of avoiding inequality and preference, foreign railway fuel cars, private cars and company fuel cars are made one of the factors upon which a mine is rated in order to fix the basis upon which its distributive share of cars is to be allotted in case of car shortage. And, from this, it must follow, if the proposition contended for be maintained, that it would not only relieve the railroad company, whose rights are here involved, from the obligation of taking into account its fuel cars in the making of the distribution, but from the duty even to consider them for the purpose of capacity rating. As a result, it would lead to the overthrow of the system of rating, prevailing on other railroads, by which, as we have said, such cars are taken into account, a consequence which is well illustrated by the case of *Logan Coal Co. v. Pennsylvania R. R. Co.*, 154 Fed. Rep. 497.

Under these conditions, it is clear that doubt, if it exist, must be resolved against the soundness of the contentions relied on. But that rule of construction need not be invoked, as we think, when the erroneous assumption upon which the proposition must rest is considered, its unsoundness is readily demonstrable. That assumption is this, that commerce in the constitutional sense only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by which such commerce is carried on, a doctrine the unsoundness of which has been apparent ever since the decision in *Gibbons v. Ogden*, 9 Wheat. 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

GRAND TRUNK RAILWAY COMPANY v. MICHIGAN
RAILROAD COMMISSION.

231 U. S. 457 (1913).

The facts are stated in the opinion.

Mr. George W. Kretzinger, Jr., with whom *Mr. G. W. Kretzinger* and *Mr. Aldis B. Browne* were on the brief, for appellants.

Mr. Hal H. Smith, with whom *Mr. Grant Fellows*, Attorney General of the State of Michigan, was on the brief, for appellees.

MR. JUSTICE McKENNA delivered the opinion of the court.

Appeal from a decree of the District Court, three judges sitting, denying a motion of appellants for interlocutory injunction against an order of the Michigan Railroad Commission and the denial of a motion of appellants for the continuance of a restraining order theretofore entered in the case.

The Commission was constituted by the Public Acts of the State and invested with quite full and detailed powers of regulation of

the railroads of the State. Act No. 300 of the Public Acts of Michigan of 1909, as amended by Act No. 139, 1911.

Section 7 as originally enacted and as amended is alone specially relevant to the discussion and is inserted in the margin, subdivision (d) being the amendment.¹

After the amendment took effect, and on July 29, 1911, the Grand Trunk System, which is constituted of a number of railroad lines, published a tariff of charges, to be effective September 1, 1911, which, among other things, set forth the rates for the designated services within the corporate limits of the City of Detroit and as to team track services as follows:

"In case team track deliveries are required for the unloading or shipments received from other carriers, or when such team tracks are used for the loading of shipments for delivery to other carriers, three dollars per car in excess of the charge made for switching to or from industrial sidings will be assessed."

This tariff also provided a charge of \$5.00 for switching to and

¹ (55) SEC. 7. (a) All railroads, subject to the provisions of this act, shall afford all reasonable and proper facilities by the establishment of switch connections between one another and the establishment of depots and otherwise for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall transfer and deliver without unreasonable delay or discrimination any freight or cars or passengers destined to any point on its own line or on any connecting line, and shall not discriminate in their rates and charges between such connecting lines: *Provided*, precedence may be given to live stock and perishable property. Nothing in this act shall be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business. Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier subject to the provisions of this act shall have the right and privilege of routing such shipments and of prescribing and directing over what connecting line property so shipped shall be transported, and it shall be the duty of the initial carrier to observe the direction of such person or such officer or agent of any corporation or company, and to cause such freight to be transported over such connecting line as may be directed and required by such shipper.

(57) (c) Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks; *Provided*, such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise safe for transportation and properly loaded; *Provided further*, if the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix

from industrial sidings and a charge of \$8.00 for team track delivery from junction points with other roads within the switching limits of Detroit.

A complaint was made by one John S. Haggerty to the Commission of this difference as discriminatory. Haggerty, it is said in one of the briefs, conducts a brick-making plant, having a siding on one of the railroads in Detroit, and to supply his trade ships carloads of freight over various railroad lines doing business in the city, among which are the lines of the Grand Trunk System.

An answer was filed to the complaint by the Grand Trunk Western Railway Company. After hearing, the Commission held that the difference in rates was discriminatory and the railway company was ordered to file a tariff removing the discrimination, that is, the discrimination between the charges for industrial switching and for switching between junction points and team tracks; and to publish and make effective "like charges for the movement of a carload shipment received from an industry within the City of Detroit, upon the said Grand Trunk Western Railway, consigned for delivery upon a team track or other siding of said road within the same city, and for a like shipment received by said Grand Trunk Western Railway from a connecting carrier at a

such other periods, having reference to the convenience and interests of the corporation or corporations and the public to be accommodated thereby, and the award of the commission shall be binding upon the respective corporations interested therein until the same shall have been revised.

(57a) (d) Every common carrier operating within this state shall receive and transport at reasonable rates any and all carload traffic offered for transportation under the usual conditions locally consigned between points in the same city or town and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town any and all such carload freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars upon such team tracks or sidings in the city or town where such car or cars are received from such connecting line when required so to do: *Provided*, that when delivery is requested which will involve the use of a private siding not owned or controlled by consignee, said consignee shall file with both receiving and delivering carriers written permission signed by the owner or lessee of such private siding authorizing the use of same. When the particular delivery desired cannot be accomplished owing to the congestion of cars upon such siding or team tracks, it shall be the duty of the delivering carrier to notify consignee of such conditions and it shall be the duty of such consignee upon receipt of such notice to advise upon what other siding delivery will be accepted or whether or not it is desired that such car or cars shall be held awaiting the opportunity for delivery upon the siding originally designated as the destination.

junction point within the corporate limits of the city of Detroit, consigned to a team track or other siding upon said road within the same city."

Subsequently to the making of such order the Grand Trunk System published a new tariff to be effective March 16, 1912, naming a rate of \$5.00 between industrial tracks and a like rate between junction points with connecting carriers, within the switching district of Detroit, and industrial tracks within the said limits; \$8.00 between junction points with other railroad companies, within said limits, and team tracks within said limits; and \$8.00 between team tracks on the railway's own lines. The tariff was duly filed with the Commission and with the Interstate Commerce Commission.

Haggerty filed a supplementary petition with the Commission complaining that the new rates were unreasonable and exorbitant, and, on March 15, 1912, the Commission ordered the postponement of the same until April 29 to give the Commission an opportunity for investigation into "the reasonableness of such proposed rate and the matter set forth in the complaint." Thereupon the Grand Trunk System issued a supplement to its tariff suspending the intrastate rates named in its tariff, and, on March 30, published a new tariff canceling all rates between industries having private sidings on the System and hold or team tracks on that System, and all rates between junction points with other carriers within the corporate limits of Detroit and the team tracks of the System. The effect of this tariff was to withdraw all intrastate and interstate switching movements, except as to the Detroit & Toledo Shore Line, with which the Grand Trunk was under contract for terminal switching.

On April 10 the Commission suspended this supplemental tariff in order to give it opportunity to investigate, and two days afterward the bill in this case was filed. On April 27 an amended bill was filed, and, on the same day, the Detroit, Grand Haven & Milwaukee Railway Company filed its bill.

We may observe that the order of the Commission of April 10 is the only one in controversy. The other orders of February 6 and March 15, 1912, were directed against the Grand Trunk Western Railway, and when it came to the knowledge of the Commission that that road did not enter the city, the orders were canceled.

The bills prayed that the acts referred to and the order of the Commission be declared null and void as to complainants, that

injunctions interlocutory and perpetual be granted restraining appellees from executing the order, and from taking any steps or proceedings to enforce any of the penalties or remedies of the statute.

Answers were filed to the bills, and supporting and attacking affidavits. The District Court upon hearing denied an injunction and vacated the restraining order, but suspended the formal entry of its orders. Subsequently the cases were consolidated for the purposes of an appeal, and an appeal allowed. The bond was fixed at \$100,000 and the restraining orders continued in force pending the appeal.

The two suits may be treated as one, the material points being identical, except as to the territory through which the roads run and the diversity of citizenship which exists only in the first suit filed. The foundation of both suits is the same, that the order of the Commission and the acts of the State under which it was made, in so far as the order and the acts require of complainants or their property any of the services above set forth or so threatened to be required, constitute the taking of their property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States; and is also a violation of the commerce clause of that instrument. The specification under the latter is "that Congress has taken over the whole subject matter of terminals, team tracks, switching tracks, sidings, etc., of carriers engaged in interstate commerce, and has enacted that such carriers shall not be required to give the use of such terminal facilities to other carriers engaged in like business."

It is further objected against said order that the companies were not incorporated for the purpose of local or intrastate switching or drayage business, but for the purpose of interstate and intrastate commerce; and, further, the penalties prescribed by the acts under which the Commission purported to have acted are so drastic that a resort to court to test the validity thereof is at the risk of imprisonment in the jails of the various counties where the lines of the companies run, and, therefore, the companies are denied the equal protection of the laws and their property is taken without due process of law.

The question in the case is whether, under the statutes of the State of Michigan, appellants can be compelled to use the tracks it owns and operates in the city of Detroit for the interchange of intrastate traffic; or, stating the question more specifically, whether the companies shall receive cars from another carrier at a junc-

tion point or physical connection with such carrier within the corporate limits of Detroit for transportation to the team tracks of the companies; and whether the companies shall allow the use of their team tracks for cars to be hauled from their team tracks to a junction point or physical connection with another carrier within such limits and be required to haul such cars in either of the above-named movements or between industrial sidings.

It is contended that the order is an interference with interstate commerce. The contention is premature, if not without foundation. Section 7, before its amendment, required all railroads subject to it to establish switching connections between one another and to establish depots, and otherwise, for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of property and passengers to and from their several lines and those connecting therewith, and also for the transfer and delivery of cars without unreasonable delay or discrimination to any point on their own lines or on any connecting line, and forbidding discrimination in rates and charges. And the respective companies were required to draw over their roads the merchandise and cars of any other corporation or individual having connecting tracks when the cars are of proper gauge, equipment, and properly loaded. Power was given to the Commission, if the compensation could not be agreed on by the roads, to fix such compensation. In other words, the duty of investigation was imposed on the Commission and the duty to render such judgment as was suitable to the situation and to award compensation to the carriers for any service required of them.

We have seen from the statement of facts that the first concern of the Grand Trunk was the right to charge what it pleased or discriminate between the services. Inconvenience to its interstate business seems to be an after thought. Besides, the fact of inconvenience is disputed. It is charged, it is true, in an affidavit filed by appellants; but there was a counter affidavit, and it was averred that the interchange of traffic required by the legislature of the State did not impede interstate business, but on the contrary facilitated it and intrastate commerce and relieved, not caused, congestion on the tracks of the various railroads in the city. And, as we have seen, the order of the Commission was suspensory only of the tariff of the appellants, not a final determination against it or of the conditions which might or might not justify it. It is too late in the day to question the competency of a State to create

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a commission and to give it the power of regulating railroads and necessarily of investigating the conditions upon which regulation may be directed. If a judicial interference is sought with the exercise of such power it must be clearly shown to have been transcended, not left as a conclusion from the balancing of conflicting affidavits, or even, it may be, as held by the District Court, on *ex parte* affidavits. Courts are reluctant to interfere with the laws of a State or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunals prevented or anticipated unless the necessity for either be demonstrated. Upon these principles the District Court acted, and rightly acted.

We will not dwell on the contention of appellants that Congress has taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc. We need make no other comment than that it cannot be asserted as a matter of law that Congress has done so; and where the accommodation between intrastate and interstate commerce shall be made we are not called upon to say on this record.

Before proceeding to the more important contention of appellants, that is, movement between junction points and other points, it is well to observe that a distinction is alleged to exist between team tracks and industrial sidings or tracks. The allegation (which is neither admitted nor denied in the answer) is that the lands upon which the latter are located are held, owned, or were acquired for the purpose of accommodating the tracks without expense to appellants, either in the acquisition or maintenance of the lands or tracks. Appellants, it is urged further, are not responsible for cars placed on such tracks nor are appellants required to police them. Team tracks are laid upon the ground acquired by appellants and were constructed and are maintained by them. The latter, therefore, are distinctly accessories or facilities in the receipt and delivery of freight in transportation, both within and to and from points outside of the city. The industrial sidings have, it may be said, more special character. But upon this distinction no point is made in the argument and the District Court left it untouched in its decision, no doubt because in that court, as here, no emphasis was put upon the distinction. In other words, because it was considered that it falls under the principles which related to the team tracks; and we may so regard it.

The proposition of appellants is, as said by the District Court, that such service and team track service "are not in a proper

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sense transportation, but are essentially distinguishable therefrom"; or, to put it another way — and one which expresses more specially the contention of appellants — they are mere conveniences at the destination or initial point of the transportation and hence are terminal facilities merely and their use is not required to be given to other railroads. The District Court did not regard them in the latter character. After stating the conditions which exist in Detroit and its extent, the court said of them: "Such tracks are necessary to prevent the congestion which would result from requiring all carload freight, both in and out, to be delivered at the freight depots of the respective roads, and in a very proper sense are shipping stations." The court concluded that the services were transportation and that the statute of the State validly empowered the Commission "to require local transportation by a railroad between its own shipping stations within a city, whether such plurality of shipping stations has been voluntarily established by the railroad, as here, or has been required by the Commission under its lawful powers, and provided such transportation is for such substantial distance and of such a character as reasonably to require a railroad haul, as distinguished from other means of carriage." The court further said: "It is clear that a statute validly may, and the statutes we are considering do, authorize the employment of such depots, side-tracks, and team tracks of a railroad for transporting carload freight to and from the junction of such road with another road as a substantial part of a continuous transportation routing, where such junction is outside the city limits." And it was remarked that the fact that the freight movement begins and ends within the limits of a city does not take from it its character "of an actual transportation between two termini," the other conditions obtaining. We concur in the conclusion of the court.

The extent of Detroit is about 22 miles, and its population about 500,000. The effect of the order is simply that the companies shall accept freight at the designated points for shipment to the other designated points. This, except in an extreme sense, is not a use of the tracks and terminals; or, rather, it is only a proper use — the use for which the roads were constituted to afford. An area of 22 miles is attempted by appellants to be localized and made a destination point. A city may, in a sense, be such a terminal unit, but considering the extent of Detroit, it is competent, we think, for the State under the conditions which this record presents to consider points within it the beginning and

destination of traffic. And to call the service necessary to such intrastate movement of freight a taking of terminals is misleading and puts out of view the full signification of the question which the record presents, which is, Is there a distinct and sufficient movement between places which the companies can be required to perform, or which, to put it another way, constitutes transportation and therefore such as the companies were created to perform? That cars may be delivered or received is but an incident. The statute therefore is a regulation of the business of appellants, not an appropriation of their terminal facilities for the use and benefit of other roads. It is therefore justified by the doctrine of *Wisconsin &c. Rd. Co. v. Jacobson*, 179 U. S. 287. See also *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257. In the *Jacobson Case* an order of the Railroad Commission of the State of Minnesota was considered which required two railroads of the State to make track connections. The statute of the State provided that all common carriers subject to its provisions should provide at all points of connection, crossing, or intersection at grade, where it was necessary for interstate commerce, ample facilities for transferring cars used in the regular business of their respective lines of road from other lines or tracks to those of any other carrier whose lines or tracks might connect with, cross or intersect their own, and should provide facilities for the interchange of cars, and for the receiving, forwarding and delivering of passengers, property and cars to and from their several lines and those of other carriers connecting therewith, without discrimination in rates and charges. And it was provided that one carrier should not be required to furnish its tracks, equipment or terminal facilities to another without reasonable compensation, the cost of connections to be proportionately divided between the carriers; and in case of disagreement, it was to be settled by the Commission. The roads were required to establish reasonable joint through rates at the demand of any person or of the Commission. And it was provided that carload lots should be transferred without unloading the cars unless it be done without cost to the shipper or receiver and without unreasonable delay.

Under this statute track connections were required to be made by the Wisconsin &c. R. R. Co., with an intersecting road. In its answer before the State Railroad Commission it alleged that to construct a connecting track would require it to go outside of its right of way and to condemn land for that purpose. In addition it urged that to compel such connection would violate the

commerce clause of the Constitution and the Fourteenth Amendment. The Commission directed the connection to be made and its order was affirmed by the local state court to which an appeal was taken, as provided by the statute. This court affirmed the order, deciding that it was a proper exercise of the power of regulation of the business of the companies. The reasoning to sustain this conclusion need not be reproduced. It rested upon the ultimate proposition that railroad companies "are organized for the public interests and to subserve primarily the public good and convenience." And deciding this to be the purpose of the creation of the roads and that government had power to secure it, it was held that where a provision for regulation is reasonable and appropriate, when considered with regard to the interests both of the company and of the public, the legislation is valid and will furnish ample authority for the courts to enforce it, even though eminent domain must be exercised or cost incurred. This principle, illustrated by the facts of the case, is apposite to the regulation under review. If the establishment of track connections by intersecting roads with its necessary accessories of sidings and switches be required and acceptance and delivery of loaded cars as a convenience of transportation, surely team tracks and sidings in Detroit and the delivery and acceptance of loaded cars are as much so.

Decree affirmed.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD
COMPANY v. BOARD OF CHOSEN FREEHOLDERS
OF THE COUNTY OF HUDSON.

227 U. S. 248 (1913).

The facts are stated in the opinion.

Mr. Albert C. Wall and Mr. Frank Bergen, with whom *Mr. James B. Vredenburg and Mr. Thomas Emery* were on the brief, for plaintiff in error.

Mr. E. Parmelee Prentice, with whom *Mr. John Griffin and Mr. George Welwood Murray* were on the brief, for defendant in error.

Mr. Henry E. Bodman, by leave of the court, filed a brief as *amicus curiæ*. *Mr. Alexis C. Angell and Mr. Herbert E. Boynton* were on the brief.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The rails of the main line of the West Shore Railroad Company extend from Buffalo to Albany, New York, and beyond through the State of New York into New Jersey to the terminus of the road at Weehawken on the west bank of the Hudson river. From Weehawken steam ferries known as the West Shore Railroad ferries are operated over the river to several terminal points in New York City for the purpose of carrying railroad passengers and traffic from Weehawken to New York and from New York to Weehawken. Although these ferries are known as West Shore Railroad ferries and are operated as railroad ferries, their business is not limited to incoming persons or traffic carried over the lines of the railroad or to persons or traffic conveyed from New York to Weehawken to be transported from there over the railroad. Indeed, from both directions a very large number of persons besides considerable traffic "constantly move to and fro between the two States, not having used or intending to use the lines of the West Shore Railroad."

In 1905 the Board of Chosen Freeholders of Hudson County, New Jersey, adopted two ordinances, one fixing the rate for foot passengers ferried from New Jersey to New York and the other for a round trip commencing on the New Jersey shore, which rates were applicable to the ferries in question. The New York Central & Hudson River Railroad, engaged as a lessee in operating the lines of the West Shore Railroad and its railroad ferries, commenced this proceeding to prevent the enforcement of the rates fixed by the ordinances. The contention was that the ordinances were an unwarranted interference with the interstate business of the company and that the enforcement of the ordinances would constitute a direct burden on interstate commerce, which could not be done consistently with the Constitution. The Supreme Court of New Jersey maintained the contentions of the railroad company. The Court of Errors and Appeals reversed the judgment of the Supreme Court. 76 N. J. Law, 664. The case is now here, the writ of error having been directed to the Supreme Court, to which the record was remitted from the Court of Errors and Appeals.

At the outset it is to be observed that the contentions pressed in argument by both parties take a wider range than the necessities of the case require. We make a very brief reference to certain decisions of this court referred to in argument by both parties

in order that they may aid us to plainly mark the boundaries of the real issues required to be decided, thus enabling us to put out of view irrelevant considerations and confine our attention to things essential.

Fanning v. Gregoire, 16 How. 524, required a consideration of the right of the legislature of Iowa to authorize a ferry across the Mississippi river at Dubuque. Without going into details it suffices to say that the subject was elaborately considered and the power of the State to grant the ferry right was sustained. In *Conway v. Taylor's Executors*, 1 Black, 603, the right of the State of Kentucky to grant franchises for ferrying across the Ohio river, was considered and the power was upheld, the general reasoning stated in *Fanning v. Gregoire* being reiterated and approved. It is undoubtedly true that in the course of the reasoning of both the cases just referred to expressions were made use of which give some support to the view that the power to regulate ferriage, even as to a stream bounding two States, was purely local, not transferred by the States to Congress, and therefore not within the grant of power to Congress to regulate commerce.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, concerned the validity of a tax imposed by the State of Pennsylvania on a ferry company operating between Gloucester, New Jersey, and the city of Philadelphia. The tax was resisted on the ground that it was a direct burden on interstate commerce and therefore void as an interference with the power of Congress to regulate commerce. The contention was sustained. The whole subject of ferriage was elaborately considered, and in the course of the opinion it was expressly declared, after considering the decisions in *Fanning v. Gregoire* and *Conway v. Taylor's Executors*, that ferriage over a stream constituting a boundary between two States was within the grant to Congress to regulate commerce, and therefore not subject to be directly burdened by a State. It was also, however, held that in view of the character of such ferries and the diversity of regulation which might be required, the right to regulate them came within that class of subjects which although within the power of Congress the States had the right to deal with until Congress had manifested its paramount and exclusive authority.

In *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, the right of the State of Kentucky to impose tolls for use of a bridge across the Ohio river, was challenged on the ground that the State had no authority to fix the tolls, because to do so was the assertion of

a power to regulate commerce and therefore was an interference with the exclusive power of Congress on that subject. The tolls were held to be invalid. The opinion beyond question reasserted the principle enforced in the *Gloucester Ferry Case* that the movement across a stream, the boundary between two States, was within the grant of power to Congress to regulate commerce and therefore, generically speaking, not subject to the exertion of state authority. Indeed, in view of the fact that there was no act of Congress dealing with the subject of the tolls which were under review in the *Covington Case*, it is true to say that there are expressions in the opinion in that case which have been considered, whether rightly or wrongly we do not feel called upon to say, as qualifying or overruling the conclusion expressed in the *Gloucester Case* as to the power of a State to regulate ferries upon a stream bordering two States until Congress had manifested its purpose to exert its authority over the subject.

In *St. Clair County v. Interstate Transfer Co.*, 192 U. S. 454, the question considered was the liability of the Transfer Company to penalties imposed by the County of St. Clair, a municipal corporation of the State of Illinois, for having failed to obtain a license "for carrying on a ferry for transferring railroad cars, loaded or unloaded, over the county of St. Clair in Illinois to the Missouri shore and from the Missouri shore to the county of St. Clair." It was decided that there was no liability for the penalty (a) because the business of transferring freight cars in the sense disclosed was not ferriage in the proper meaning of that word, and was the transaction of interstate commerce not in any view subject to state control; and (b) because the particular ordinance relied upon as the basis for imposing the penalty was void because of provisions discriminating against interstate commerce which it contained. The cases of *Fanning v. Gregoire*, *Conway v. Taylor's Executors*, *Gloucester Ferry Co. v. Pennsylvania* and *Covington Bridge Co. v. Kentucky* were referred to. It was expressly declared in view of the special grounds upon which the case was decided that it was unnecessary to consider whether the decision in the *Covington Bridge Case* had established the doctrine that the interstate business of ferrying over navigable rivers bordering two States was exclusively within the authority of Congress to regulate, and therefore was not, as declared in the *Gloucester Ferry Case*, subject to state regulation until Congress had exerted its authority over the matter.

In the light of this statement we come to state the contentions

of the parties. The plaintiff in error insists, not following the exact order of its argument, *a*, that the assailed ordinances are repugnant to the commerce clause because Congress has legislated concerning railroad ferries and thereby manifested its purpose that there should be no longer room for the exertion of state power on the subject; and, *b*, that if this is not so it is now necessary to pass on the question reserved in the *St. Clair Case*, and to decide that the ruling in the *Covington Bridge Case* affirmatively established that interstate ferriage like that here in question is so absolutely within the power of Congress as to exclude even in case of the inaction of Congress the presumption of a license for the exercise of state power. On the other hand, the argument for the defendant in error is this: That the carrying on of the business of ferriage on navigable rivers constituting a boundary between States is not interstate commerce, that the power to regulate it was not surrendered by the States and consequently no authority was given over the subject to Congress. This is sought to be shown by a copious review of adjudged cases, and by an analysis of what it is urged was the clear intendment of the opinion in *Gibbons v. Ogden*, especially as elucidated by the opinions in *Fanning v. Gregoire* and *Conway v. Taylor's Executors*. It is not denied that these theories are directly contrary to the ruling in the *Gloucester Ferry Case*, but it is urged that that case for the first time announced the doctrine of a national power over interstate ferriage and therefore practically amounted to making a new constitutional provision on the subject. Obviously, however, the views just stated are advanced in a mere academic sense, since the argument admits that the ruling in the *Gloucester Ferry Case* is now conclusive and has settled the significance of the Constitution contrary to the views mentioned. Thus, at the very outset of the argument, after stating and elaborating the theory of exclusive state power over interstate ferriage, it is said: "The decision of the *Gloucester Ferry Case*, 114 U. S. 196, decided in 1885, established Federal jurisdiction to legislate concerning ferriage over boundary streams, but did not turn what had been an exclusive state jurisdiction into an exclusive Federal jurisdiction. State laws on this subject are still valid until superseded by a Federal statute." Again, after copiously reiterating the conceptions as to the novelty of the ruling in the *Gloucester Ferry Case* and its assumed conflict with what had gone before, it is said: "The result of the *Gloucester Ferry Case*, therefore, with the other cases which have followed, has probably been to so extend the Federal authority over interstate fer-

riage as to bring the subject within the concurrent jurisdiction of Congress and of the States. It is a concurrent jurisdiction only, however, which has been established. In the absence of Federal legislation the States have all the power that they have been accustomed to exercise." Thus conceding the controlling force of the *Gloucester Ferry Case* and therefore not questioning the power of Congress which that case upheld, it is urged that the *Covington Bridge Case* should not be now held to have overruled or qualified the *Gloucester Ferry Case* so as to exclude the States from any right to regulate interstate ferriage before and until Congress has manifested its intention to exert its authority by dealing with the subject. Upon the assumption thus stated it is insisted that the court below rightly upheld the assailed ordinances because there has been no action by Congress exerting its authority over the subject with which the ordinances deal and therefore no room for the contention that it was not within the power of the State to enact them.

It is therefore apparent that the contentions of the plaintiff in error primarily invoke only the controlling effect of the ruling in the *Gloucester Ferry Case*, and insist that there has been action by Congress which destroys the presumption of authority in the State to act. It follows that the proposition that the *Covington Bridge Case* overruled the *Gloucester Ferry Case* is merely subordinate, and need not be considered unless it becomes necessary in consequence of an adverse ruling on the primary contention concerning the application of the *Gloucester Ferry Case*.

It is equally clear that the contention of the defendant in error as to the absence of all power in Congress over interstate ferries is merely academic. From this it necessarily arises that the only ground relied upon to sustain the judgment below is the ruling in the *Gloucester Ferry Case*, and the further proposition that there has been no action of Congress over the subject of the ferriage here involved which authorizes the holding that state power no longer obtains. As, therefore, the claim on the one side of an all-embracing and exclusive Federal power may be, temporarily at least, put out of view and the assertion on the other of an absolutely exclusive state power may also be eliminated from consideration because not relied upon or because it is both demonstrated and admitted to be without foundation, it follows that to dispose of the case we are called upon only, following the ruling in the *Gloucester Ferry Case*, to determine the single and simple question whether there has been such action by Congress as to destroy the presumption as to the existence in the State of vicarious and rev-

ocable authority over the subject. We say simple question because its decision is, we think, free from difficulty, in view of the express provision of the first section of the Act to Regulate Commerce (act of February 4, 1887, c. 104, 24 Stat. 379), subjecting railroads as therein defined to the authority of Congress, and expressly declaring that "the term railroad as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease. . . ." The inclusion of railroad ferries within the text is so certain and so direct as to require nothing but a consideration of the text itself. Indeed, this inevitable conclusion is not disputed in the argument for the defendant in error, but it is insisted that as the text only embraces railroad ferries and the ordinances were expressly decided by the court below only to apply to persons other than railroad passengers, therefore the action by Congress does not extend to the subject embraced by the ordinances. But as all the business of the ferries between the two States was interstate commerce within the power of Congress to control and subject in any event to regulation by the State as long only as no action was taken by Congress, the result of the action by Congress leaves the subject, that is, the interstate commerce carried on by means of the ferries, free from control by the State. We think the argument by which it is sought to limit the operation of the act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from State to State is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the States over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a State to regulate interstate

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ferriage exists "only in the absence of Federal legislation" and at the same time to assert that the state and Federal power over such subject is concurrent is a contradiction in terms. But this view has been so often applied as to cause the subject to be no longer open to controversy. *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Company*, 226 U. S. 426. Because in the *St. Clair Case*, *supra*, it was decided that a particular character of transportation of interstate commerce was not ferriage and not within state power, even where there had been no action by Congress, affords no reason for in this case extending state authority to a subject to which, consistently with the action of Congress, it cannot be held to apply.

The judgment of the Supreme Court of the State of New Jersey will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

*Reversed.*¹

¹ But as to ferries not part of a continuous interstate carrier system see *Port Richmond Ferry v. Hudson County*, 234 U. S. 317.—Ed.

CHAPTER II

DUTIES OF "CARRIERS" UNDER THE ACT¹

1. SERVICES TO BE RENDERED

PENNSYLVANIA COMPANY v. UNITED STATES

(INTERSTATE COMMERCE COMMISSION *et al.* Interveners).

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA.

214 Fed. Rep. 445 (1914).²

The Pennsylvania Company (hereafter called complainant) had terminal facilities within the switching district of Newcastle, Pa., and tracks connecting with numerous industries located along or connected with its facilities on other railroads. Within such district there was also physical connection between complainant's tracks and those of the Baltimore and Ohio Railroad Company, over the tracks of which the Buffalo, Rochester and Pittsburgh Company operated trains from Buffalo to Newcastle. The complainant received cars tendered to it by the Pittsburgh, the Erie, and the Baltimore and Ohio at junction points within the switching limits of Newcastle and transported them to industries on its line within the city for the uniform charge of two dollars per car and transported cars from industries on its line in Newcastle to junction points with the three carriers just named for a similar charge. The complainant refused to transport interstate cars within the switching limits tendered by the Buffalo, Rochester and Pittsburgh Company to it at junction points within the switching limits of Newcastle or to transport cars from industries on its line within such switching limits to junction points on the Buffalo, Rochester and Pittsburgh for transportation by it beyond, compelling such industries to dray their traffic from or to the complainant's yards to a great disadvantage. The Buffalo,

¹ Duties of carriers are often so inextricably tied up with questions as to their enforcement that many cases logically falling under this chapter are dealt with in Chapters III and IV.—*Ed.*

² The facts have been briefly restated.—*Ed.*

Rochester and Pittsburgh Company thereupon proceeded against the complainant before the Interstate Commerce Commission demanding the same switching service accorded to the other carriers.

The complainant contended that the three carriers to whom switching facilities were accorded were in a position to offer reciprocal advantages to it for the switching done at Newcastle, while the Buffalo, Rochester and Pittsburgh Company could not offer such reciprocal advantages. The Commission, however, found that car-load shipments transported to Newcastle by the Baltimore and Ohio or by the Buffalo, Rochester and Pittsburgh arrived at Newcastle under similar circumstances and conditions and held such practice an undue and unreasonable discrimination and accordingly made an order directing the Pennsylvania Company to cease such practice, 29 I. C. C. 114. Thereupon the complainant brought the present proceedings, asking the Court for an order to restrain the United States from enforcing the aforesaid order. The Interstate Commerce Commission, and the Buffalo, Rochester and Pittsburgh Company intervened.

F. D. McKenney, of Washington, D. C., and *Gordon Fisher*, *A. P. Burgwin*, and *Dalzell*, *Fisher & Hawkins*, all of Pittsburgh, Pa., for Pennsylvania Co.

E. Lowry Humes, U. S. Atty., of Meadville, Pa., and *Blackburn Esterline*, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Joseph W. Folk, of St. Louis, Mo., and *Charles W. Needham*, of Washington, D. C., for Interstate Commerce Commission.

William A. Glasgow, Jr., of Philadelphia, Pa., for intervening carrier, Buffalo, Rochester & Pittsburgh Co.

Before BUFFINGTON and HUNT, Circuit Judges, and ORR, District Judge.

HUNT, Circuit Judge (after stating the facts as above).¹ The motion for a restraining order was asked upon the premise that, if that portion of section 3 of the act to regulate commerce, which requires that every carrier subject to the provisions of the act shall, according to its respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines for receiving, forwarding, and delivering

¹ The facts have been abbreviated.—Ed.

property to and from the several lines and those connected therewith without discriminating in their rates and charges between such connecting lines, stood alone, the Pennsylvania Company would be obliged to perform the service which the Buffalo, Rochester & Pittsburgh Company wishes it to perform, and which the order of the Interstate Commerce Commission says it shall perform. The question, therefore, is whether the additional clause in section 3, forbidding a construction of the language just referred to, which will require any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business, can under the facts avail the Pennsylvania Company.

We hold that it is not a use of the tracks or terminal facilities of the Pennsylvania Company that the Buffalo, Rochester & Pittsburgh Company seeks for itself, but a service of transportation in receiving and forwarding freight tendered by it to the Pennsylvania Company, a service to be performed upon the payment of a reasonable compensation to the Pennsylvania Company; such compensation to be fixed, of course, in the first instance by that company. The use of the tracks and terminal facilities under the service asked for will be no greater than that which the Pennsylvania Company extends to other carriers which may desire traffic carried. No physical occupancy by running trains or locomotives of the Buffalo, Rochester and Pittsburgh Company is asked; there being, as we look at it, only tender of freight at a point of interchange already established by the Pennsylvania Company, and where it receives the cars of every other road except the Buffalo, Rochester & Pittsburgh Company and hauls after delivery. The facts, therefore, take the case from within the scope of the rule of *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, where the Stock Yards Company demanded that the cars should be received by the Louisville & Nashville at a point which was an arbitrary one, near its terminus.

We have given careful consideration to the argument of counsel for the Pennsylvania Company in their effort to withdraw the case from the rule laid down in *Grand Trunk Railway Co. v. Michigan Railroad Commission*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310, but we believe the doctrine of that case controls this. The statute of the state of Michigan which was there examined by the court, in so far as it required interchange of traffic, was quite similar to the provisions of the act to regulate commerce pertinent to this case, for the language of the Michigan law, which required the forwarding and delivering of property, contained a proviso

to the effect that nothing in the statute should be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business. The extent of the city of Detroit was considered, and necessarily the court was called upon to distinguish the facts in order to demonstrate the inapplicability of its previous ruling in *Louisville & Nashville Railroad v. Stock Yards Co.*, *supra*, upon which reliance was placed by the railroad company in its effort to prevent the enforcement of the order of the State Commission. The court, however, regarded the effect of the order made by the state Railroad Commission as merely requiring the railroad companies to accept freight at the designated points for shipment to other designated points, and said that, "except in an extreme sense," such an acceptance of freight was not a use of tracks and terminals other than in the sense of being only a proper use for which the roads were constituted to afford. So, upon the principle that the order made was a regulation of the business of a carrier and not an appropriation of terminal facilities for the use and benefit of other roads, it was sustained.

The underlying principle is that a common carrier may be required to accept a car for transportation whenever such a car is offered at a place where the common carrier has established a point of interchange, provided always a reasonable compensation is fixed for the service. Here, the place where the cars are offered not being an arbitrary one, the carrier Pennsylvania Company may not inquire into the ownership of the car, nor into the route over which it has been moved to reach its rails merely to decide whether or not it will transport the car so offered. To hold otherwise would greatly diminish the regulating power of the Interstate Commerce Commission to treat all carriers as within the letter of the act to regulate commerce with respect to their duties to transport. It follows that, where compensation is offered, a practice of hauling the cars of several connecting carriers and absolutely refusing to haul the cars of another carrier is a discrimination which, in the interests of the public, may be removed as properly within the power of just and reasonable regulation by the Interstate Commerce Commission. *Interstate Commerce Commission v. Delaware, L. & W. R. Co.*, 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448.

The question of reasonable compensation is in no way involved, and no opinion is passed thereon.

Restraining order must be denied.¹

¹ The dissenting opinion of Judge Buffington is omitted. — Ed.

NORFOLK & WESTERN RAILWAY COMPANY v.
DIXIE TOBACCO COMPANY.

228 U. S. 593 (1913)

The facts are stated in the opinion.

Mr. Francis Markoe Rivinus (by special leave), with whom *Mr. S. Griffin*, *Mr. Thomas Reath* and *Mr. Theodore W. Reath* were on the brief, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action brought by the defendant in error to recover for damage to tobacco shipped by it on the railroad at Bedford City, Virginia, to Marshall, Texas. The plaintiff got a verdict and judgment, which was affirmed by the Supreme Court of Appeals (111 Virginia, 813), the case having been taken there on the ground that the act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 595, amending § 20 of the Act to Regulate Commerce, of February 4, 1887, c. 104, 24 Stat. 379, 386, is unconstitutional. This section requires any common carrier receiving property for transportation from a point in one State to a point in another to issue a receipt or bill of lading for the same; makes the receiving carrier liable for loss caused by any common carrier *in transitu*; and provides that no contract shall exempt it from the liability thus imposed.

The bill of lading stipulated that no carrier should be liable for damages not occurring on its portion of the through route. There was evidence that the tobacco was damaged after it left the railroad company's hands; and the defendant asked an instruction that if the jury believe that it delivered the tobacco in good order to the next carrier the verdict should be in its favor. This instruction was refused and the defendant excepted. There was evidence also that the plaintiff chose the route for the tobacco, being partly by sea and a different one from that which the railroad would have adopted, which would have been all rail. The railroad had no through route or rate established with the line of steamers by which the tobacco went. Instructions were asked and refused, subject to exception, that the bill of lading controlled, and that the above statute, so far as it attempts to invalidate limitations or liabilities like that quoted above, is void.

The Supreme Court of Appeals followed the ruling in *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186 (to which may be added *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U. S. 481), as conclusive. The plaintiff in error contends that these cases may be distinguished on the ground that in both of them it was to be presumed that the carrier was a voluntary party to a through route and rate, whereas here the stipulation against liability beyond its line and the fact that it had no through route with the steamship company exclude that presumption. It argues that as it was bound to accept goods destined beyond its line for delivery to the next carrier and was required by the statute to give a through bill of lading, if on such compulsory acceptance it is made answerable for damages done by others its property is taken without due process of law. But in the former case there was the same stipulation in the bill of lading, and the supposed through routes were only presumed. In the second case the carrier is spoken of as voluntarily accepting goods for a point beyond its line, but there too there was the same attempt to limit liability, and in the present case the acceptance was voluntary in the same degree as in that. There is no substantial distinction between the earlier decisions and this.

*Judgment affirmed.*¹

ADAMS EXPRESS COMPANY *v.* CRONINGER.

226 U. S. 491 (1913).

THIS was an action in the Circuit Court of Kenton County, Kentucky, against the Express Company to recover the full market value of a small package containing a diamond ring which was delivered by the plaintiff below to the Express Company at its office in Cincinnati, Ohio, consigned to J. W. Clendenning at Augusta, Georgia. The package was never delivered.

The Express Company made defense by answer. The plaintiff demurred to the answer as not containing a defense, which demurrer was sustained. The company declined to further plead, whereupon the Circuit Court gave judgment for the sum of \$137.52,

¹ Actions under the Carmack Amendment may be brought in the State Courts, *Galveston, etc., Ry. Co. v. Wallace*. 223 U. S. 481 (1912). — Ed.

being the full value of the ring and interest. A writ of error was sued out from this court to the Circuit Court of Kenton County, that being the highest court of the State in which a decision could be had.

The answer and accompanying exhibit were in substance as follows:

That the defendant was an express company engaged in interstate commerce within the provisions of the act of Congress of June 29, 1906; that in obedience to that act it had duly filed with the Interstate Commerce Commission schedules showing its rates and charges from Cincinnati to Augusta, Georgia, which schedules showed that its rates and charges, when the value of the property to be carried was in excess of fifty dollars, were graduated reasonably, according to the value, and that the lawful rate upon the package of the plaintiff from Cincinnati to Augusta was twenty-five cents if the value was fifty dollars or less, and was fifty-five cents if its value was one hundred and twenty-five dollars.

It is averred that the plaintiff knew that the charges upon the package shipped were based upon the value of the shipment, and that it (the defendant) required that the value should be declared by the shipper, and that if he did not disclose and declare the value when he delivered the shipment to it at Cincinnati for transportation to Augusta, the rate charged would be based upon a valuation of fifty dollars. It is then alleged that the package so delivered was sealed and that defendant did not know the contents or value, and that if it had it would not have received it for carriage for less than the lawful published rate of fifty-five cents. The receipt or bill of lading issued shows no value, but contains a stipulation in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more than the value so stated, nor for more than fifty dollars if no value is stated herein."

Mr. Lawrence Maxwell, with whom *Mr. Joseph S. Graydon* was on the brief, for plaintiff in error.

Mr. John Randolph Schindel, with whom *Mr. Morison R. Waite* was on the brief, for defendant in error.

MR. JUSTICE LURTON, after making the foregoing statement, delivered the opinion of the court.

The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment; and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this court jurisdiction.

Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, "unless," as said in *Adams Express Company v. Walker*, 119 Kentucky, 121, 129, and affirmed in *Southern Express Company v. Fox and Logan*, 131 Kentucky, 257, "sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law."

The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce.

That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected: *Smith v. Alabama*, 124 U. S. 465; *New York &c. Railroad v. New York*, 165 U. S. 628; *Chicago, Milwaukee & St. P.*

Ry. v. Solan, 169 U. S. 133, 137; *Richmond &c. Ry. v. Patterson Co.*, 169 U. S. 311; *Cleveland &c. Ry. v. Illinois*, 177 U. S. 514; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477. In the *Solan Case*, cited above, it was said of such state legislation:

"They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits."

In that case the court upheld the validity of an Iowa statute which made void every "contract, receipt, rule or regulation, which shall exempt any railway from liability as a common carrier, which would exist had no contract, receipt, rule, or regulation been made or entered into."

The contract there involved was for transportation of cattle with a drover in charge, and the shipper had signed a contract limiting the liability to himself or the drover to \$500 for injury to the person of the drover. Proof was offered that this limitation was the consideration for a reduced rate of transportation.

In *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 487, 491, there was involved a bill of lading in all essentials identical with the one here concerned, whereby it was stipulated that in consideration of a reduced rate of freight, the shipper should receive, in case of negligent loss, the agreed value declared in the receipt. The shipment was made in New York, where the stipulation was valid, to a point in Pennsylvania, where such a limitation was invalid. The loss occurred in the latter State, and the Supreme Court of the State upheld a judgment for the full value, declaring the limitation invalid as forbidden by the public policy of that State. That case came to this court upon the contention that the Pennsylvania court in refusing to limit the recovery to the valuation agreed upon had denied to the railroad company a right or privilege secured to it by the Interstate Commerce Law. But this court as to that said (p. 487):

"It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration

of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, 24 Stat. 379, 382; 25 U. S. Stat. 855, provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

"While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?"

In view of the decisions of this court in the two cases last referred to, we shall assume that this case is governed by them, unless the subsequent legislation of Congress is such as to indicate a purpose to bring contracts for interstate shipments under one uniform rule of law not subject to the varying policies and legislation of particular States.

The original Interstate Commerce Act of February 4, 1887,

24 Stat. 379, c. 104, was extensively amended by the act of June 29, 1906, 34 Stat. 584, c. 3591. We may pass by many of the changes and amendments made by the latter act as not decisive, and come at once to the far more important amendment made in § 20, an amendment bearing directly upon the carrier's liability or obligation under interstate contracts of shipment, and generally referred to as the Carmack amendment. For convenience of reference, it is set out in the margin.¹

This amendment came under consideration in *Atlantic Coast Line v. Riverside Mills*, 219 U. S. 186, but the opinion and judgment was confined to that provision of the act which made the initial carrier liable for a loss upon the line of a connecting carrier, the property having been received under a bill of lading which confined the liability of the initial carrier to loss occurring upon its own line.

The significant and dominating features of that amendment are these:

First: It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one State to a point in another."

Second: Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third: It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass."

¹ That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

Fourth: It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both Federal and state courts, was either that of the general common law as declared by this court and enforced in the Federal courts throughout the United States, *Hart v. Pennsylvania Railroad*, 112 U. S. 331; or that determined by the supposed public policy of a particular State, *Pennsylvania Railroad v. Hughes*, 191 U. S. 477; or that prescribed by statute law of a particular State, *Chicago &c. Railroad v. Solan*, 169 U. S. 133.

Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in *Southern Pacific Co. v. Crenshaw*, 5 Ga. App. 675, 687, 63 S. E. Rep. 865, where that court said:

"Some States allowed carriers to exempt themselves from all or a part of the common law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from liability in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the state court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power

to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. *Northern Pacific Ry. v. State of Washington*, 222 U. S. 370; *Southern Railway v. Reid*, 222 U. S. 424; *Mondou v. Railroad*, 223 U. S. 1.

To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.

What is the liability imposed upon the carrier? It is a liability to any holder of the bill of lading which the primary carrier is required to issue "for any loss, damage or injury to such property caused by it," or by any connecting carrier to whom the goods are delivered. The suggestion that an absolute liability exists for every loss, damage or injury, from any and every cause, would be to make such a carrier an absolute insurer and liable for unavoidable loss or damage though due to uncontrollable forces. That this was the intent of Congress is not conceivable. To give such emphasis to the words, "any loss or damage," would be to ignore the qualifying words, "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common law duty as a common carrier.

But it has been argued that the non-exclusive character of this regulation is manifested by the proviso of the section, and that state legislation upon the same subject is not superseded, and that the holder of any such bill of lading may resort to any right of

action against such a carrier conferred by existing state law. This view is untenable. It would result in the nullification of the regulation of a national subject and operate to maintain the confusion of the diverse regulation which it was the purpose of Congress to put an end to.

What this court said of § 22 of this act of 1906 in the case of *Texas & Pac. Ry. v. Abilene Cotton Mills*, 204 U. S. 426, is applicable to this contention. It was claimed that that section continued in force all rights and remedies under the common law or other statutes. But this court said of that contention what must be said of the proviso in § 20, that it was "evidently only intended to continue in existence such other rights or remedies for the redress of some specific wrong or injury, whether given by the Interstate Commerce Act, or by state statute, or common law, not inconsistent with the rules and regulations prescribed by the provisions of this act." Again, it was said, of the same clause, in the same case, that it could "not in reason be construed as continuing in a shipper a common law right the existence of which would be inconsistent with the provisions of the act. In other words, the act cannot be said to destroy itself."

To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing Federal law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing state laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable.

We come now to the question of the validity of the provision in the receipt or bill of lading limiting liability to the agreed value of fifty dollars, as shown therein. This limiting clause is in these words:

"In consideration of the rate charged for carrying said property, which is regulated by the value thereof and is based upon a valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars, unless a greater value is stated herein, and that the company shall not be liable in any event for more

than the value so stated, nor for more than fifty dollars if no value is stated herein."

The answer states that the schedules which the express company had filed with the Interstate Commerce Commission showed rates based upon valuations; and that the lawful and established rate for such a shipment as that made by the plaintiff from Cincinnati to Augusta, having a value not in excess of fifty dollars, was twenty-five cents, while for the same package if its value had been declared to be one hundred and twenty-five dollars, the amount for which the plaintiff sues as the actual value, the lawful charge according to the rate filed and published would have been fifty-five cents. It is further averred that the package was sealed, and its contents and actual value unknown to the defendant's agent.

That no inquiry was made as to the actual value is not vital to the fairness of the agreement in this case. The receipt which was accepted showed that the charge made was based upon a valuation of fifty dollars unless a greater value should be stated therein. The knowledge of the shipper that the rate was based upon the value is to be presumed from the terms of the bill of lading and of the published schedules filed with the Commission. That presumption is strengthened by the fact that across the top of this bill of lading there was this statement in bold type, "This Company's charge is based upon the value of the property, which must be declared by the shipper."

That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *York Mfg. Co. v. Illinois Central Railroad*, 3 Wall. 107; *Railroad Company v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Express Company*, 93 U. S. 174; *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 338. The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported.

It has therefore become an established rule of the common law as declared by this court in many cases that such a carrier may by a fair, open, just and reasonable agreement limit the amount recoverable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk. *York Mfg. Co. v. Railroad*, 3 Wall. 107; *Railroad v. Lockwood*, 17 Wall. 357; *Hart v. Pennsylvania Railroad*, cited above; *Phoenix Ins. Co. v. Erie & W. Trans. Co.*, 117 U. S. 312, 322; *Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 442; *New York, L. E. & W. Ry. v. Estill*, 147 U. S. 591, 619; *Primrose v. W. U. Tel. Co.*, 154 U. S. 1, 15; *Chicago &c. Ry. v. Solan*, 169 U. S. 133, 135; *Calderon v. Atlas Steamship Company*, 170 U. S. 272, 278; *Pennsylvania Railroad v. Hughes*, 191 U. S. 477, 485.

That such a carrier might fix his charges somewhat in proportion to the value of the property is quite as reasonable and just as a rate measured by the character of the shipment. The principle is that the charge should bear some reasonable relation to the responsibility, and that the care to be exercised shall be in some degree measured by the bulk, weight, character and value of the property carried.

Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss. Nor does a limitation based upon an agreed value for the purpose of adjusting the rate conflict with any sound principle of public policy. The reason for the legality of such agreements is well stated in *Hart v. Pennsylvania Railroad*, cited above, where it is said (p. 340):

"The limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value agreed on. The carrier is bound to respond in that value for negligence. The compensation for carriage is based on that value. The shipper is estopped from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation, between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the

soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States. *Greenwald v. Barrett*, 199 N. Y. 170, 175; *Bernard v. Adams Express Co.*, 205 Massachusetts, 254, 259. The exemption forbidden is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. In the same case, just such a stipulation as that here involved was upheld, the court saying (p. 259):

"But such a contract as we are considering in this case is not an exemption from liability for negligence in the management of property, within the meaning of the statute. It is a contract as to what the property is, in reference to its value. The purpose of it is not to change the nature of the undertaking of the common carrier, or limit his obligation in the care and management of that which is entrusted to him. It is to describe and define the subject matter of the contract, so far as the parties care to define it, for the purpose of showing of what value that is which comes into the carrier's possession, and for which he must account in the performance of his duty as a carrier. It is not in any proper sense a contract exempting him from liability for the loss, damage or injury to the property, as the shipper describes it in stating its value for the purpose of determining for what the carrier shall be accountable upon his undertaking, and what price the shipper shall pay for the service and for the risk of loss which the carrier assumes."

In *Greenwald v. Barrett*, cited above, the same conclusion was reached as to the nature of the liability imposed and the purport of the exemption forbidden, the court, among other things, saying:

"The language of the enactment does not disclose any intent to abrogate the right of common carriers to regulate their charges for carriage by the value of the goods or to agree with the shipper upon a valuation of the property carried. It has been the uniform practice of transportation companies in this country to make their

charges dependent upon the value of the property carried and the propriety of this practice and the legality of contracts signed by the shipper agreeing upon a valuation of the property were distinctly upheld by the Supreme Court of the United States in *Hart v. Penn. R. R. Co.*, 112 U. S. 331, 341."

To the same effect are the cases of *Travis v. Wells, Fargo Co.*, 79 N. J. L. 83; *Fielder v. Adams Express Co.*, 69 W. Va. 138; *S. C.*, 71 S. E. Rep. 99; *Larsen v. Oregon Short Line*, 38 Utah, 130; *S. C.*, 110 Pac. Rep. 983. See also, *Atkinson v. New York Transfer Co.*, 76 N. J. L. 608, as to the general rule.

That a carrier rate may be graduated by value and that a stipulation limiting recovery to an agreed value made to adjust the rate is recognized by the Interstate Commerce Commission, see 13 I. C. C. Rep. 550.

We therefore reach the conclusion that the provision of the act forbidding exemptions from liability imposed by the act is not violated by the contract here in question.

The demurrer to the answer of the defendant below should have been overruled.

*For this reason the judgment is reversed, with direction to overrule the demurrer, and for such further proceedings as are not inconsistent with this opinion.*¹

¹ So also when the value is fixed in receipt in absence of declared value by shipper, *Wells, Fargo & Co. v. Neiman-Marcus*, 227 U. S. 469 (1913), where bill of lading reads: "released to valuation of" *Kansas Southern Ry. v. Carl*, 227 U. S. 639 (1913), when limitation is expressed in printed forms, *Great Northern Ry. v. O'Connor*, 232 U. S. 508 (1914), where liability is limited through filed tariff, *Chicago R. I. & Pac. Ry. v. Cramer*, 232 U. S. 490 (1914), *Atchison St. Ry. Co. v. Robinson*, 233 U. S. 173 (1914), even as to baggage, *Boston & Maine R. R. v. Hooker*, 233 U. S. 97 (1914). As to the timeliness of raising the Federal right of limitation in the State Courts, see *Louisville & Nashville R. R. v. Woodford*, 234 U. S. 46 (1914).

The validity of limitation as to time within which action is to be brought is now likewise withdrawn from state action and is valid under the Carmack Amendment, Mo., *Kans. & Tex. Ry. v. Harriman*, 227 U. S. 657 (1913).

State laws as to reasonable attorney's fees in actions for loss of goods are not rendered inoperative by Carmack Amendment, Missouri, *Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412 (1914). — Ed.

UNITED STATES, CINCINNATI AND COLUMBUS TRACTION COMPANY, AND INTERSTATE COMMERCE COMMISSION v. BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY AND THE NORFOLK AND WESTERN RAILWAY COMPANY.

226 U. S. 14 (1912).

The facts are stated in the opinion.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States and *Mr. Charles W. Needham* for Interstate Commerce Commission, appellants.

Mr. R. Walton Moore, *Mr. Edward Barton* and *Mr. Theodore W. Reath*, with whom *Mr. Joseph I. Doran* and *Mr. F. Markoe Rivinus* were on the brief, for appellees.

Mr. C. B. Matthews filed a brief for the appellant, Cincinnati & Columbus Traction Company.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit to set aside an order of the Interstate Commerce Commission directing the appellees to establish switch connections with the road of the appellant and also through routes to and from points on that road. 20 I. C. C. Rep. 486. The Commerce Court made a decree as prayed, 195 Fed. Rep. 962, and an appeal was taken to this court. The facts material to our decision are as follows. The Baltimore and Ohio Southwestern Railroad and the Norfolk and Western Railway are trunk lines of steam railroads running east and west across the State of Ohio. After almost touching each other at Norwood, a suburb of Cincinnati, they draw apart, the former in a northerly, the latter in a southerly direction, but come together again at Hillsboro about fifty-three miles further to the east. The line of the Traction Company is an 'interurban' electric railway, for passengers and some freight, running under a state charter between Norwood and Hillsboro through the middle of the diamond enclosed by the steam roads, and authorized to go on to Columbus. For a number of miles easterly from Norwood to Stonelick, near Boston, the last mentioned road is very near and almost parallel to the tracks of one or the other of the steam roads, as it is again for the last five miles before reaching Hillsboro. In the intervening space, between Boston and Dodsonville, the towns and villages on the electric line are from five to ten or twelve miles by wagon distant from the nearest station on one of the steam roads. The Traction

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Company applied to the Commission for switch connections and they were ordered as we have said.

Some technical objections were raised, but the substantial question is whether the Traction Company is a "lateral, branch line of railroad" within the meaning of the first section of the Act to Regulate Commerce, amended by act of June 18, 1910, c. 309, § 7, 36 Stat. 539, 547. That section requires carriers subject to the act to establish switch connections with such lines on certain conditions; and, as amended, permits owners of such lines as well as shippers to make complaint to the Commission in case of the carriers' failure upon written application, and authorizes the Commission to hear, investigate and determine whether the conditions exist, and to make an order directing the carrier to comply with the act. It will be seen without much argument that, unless the Traction Company is a lateral, branch line of railroad, the trunk line carriers, the appellees, are not subject to the requirement of the statute, so far as the Traction Company is concerned.

The words 'lateral, branch line' do not refer to what the applicant may become or be made by order of the Commission but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of lines. The most obvious examples of such lines are those that are dependent upon and incident to the main line — feeders, such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment. We agree with the Commerce Court that the Traction Company is not within this class. It is an independent venture, in its general course parallel to, more or less competing with, the steam roads and working on a different plan. Presumably and so far as appears it was built and would have been run without regard to the existence of the steam roads. The cases cited on behalf of the appellants as to the power of railroad companies to construct branch roads under their charter do not apply. There the determination of the company fixes the character of the branch; it builds the branch from the beginning as incident to the purposes of the company. But here, as we have said, this determination of the Commission that the applicants shall be a branch is not enough; the applicant must be a branch before it applies. That is the absolute and reasonable condition. That some shippers would be accommodated by a switch connection is not enough. . . .

Decree affirmed.

SOUTHERN PACIFIC COMPANY v. INTERSTATE
COMMERCE COMMISSION.

SOUTHERN CALIFORNIA RAILWAY COMPANY
v. SAME.

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY v. SAME.

SANTA FE PACIFIC RAILROAD COMPANY
v. SAME.

SOUTHERN PACIFIC COMPANY v. SAME.

200 U. S. 536 (1906).¹

219. So. Pac. RR etc. v. ICC, 200 U.S. 536 (1906).
The So. Pac. and the S. Fe (initial carriers) of fruit
from Cal to the East, made arrangements for rates
over their routes with certain connecting RRs. This
was to avoid rebates given by certain other connect-
ing carriers to the shippers. The rates over these
two routes were not unreasonable and no discrim-
ination was made between shippers. The ICC order
ed the initial carriers to cease from exacting
from shippers the right to make the route which the
freight should take.
Order of ICC reversed. The ICC is not violated
by this arrangement of the initial carriers. They
are free to contract as long as their rates are
reasonable and they do not discriminate.

chairman, Mr. Commissioner Knapp, dissenting) ordered the
defendant carriers to cease from exacting from shippers the right
themselves to make the route which the freight should take.

The initial carriers, believing the Commission had erred in its
decision, refused to obey the order which it made, and thereupon
the Commission, pursuant to the sixteenth section of the act,
filed its bill in the Circuit Court for the purpose of enforcing its
order.

¹ The facts have been briefly restated. — Ed.

The bill thus filed by the Commission was demurred to by the defendants, and the demurrer was overruled. 123 Fed. Rep. 598. The railroad companies then answered, and the case, after the taking of further evidence, came up for final hearing, when the order of the Commission was affirmed and directed to be enforced (132 Fed. Rep. 829), although the Circuit Court put the affirmance on the ground that the agreement as to routing showed that there was a violation of § 5 of the Commerce Act, in that such agreement amounted to a contract or combination for the pooling of freights. The court passed upon no other question raised in the case. A very full statement of facts is contained in the report in 132 Fed. Rep. *supra*.

A motion was made for a supersedeas pending the hearing of this appeal, which, for the reasons stated in the opinion of the Circuit Court, was denied. 137 Fed. Rep. 606.

Mr. Robert Dunlap, with whom *Mr. Thomas J. Norton* and *Mr. Gardiner Lathrop* were on the brief, for appellants, Southern California Railway Company, Atchison, Topeka & Santa Fe Railway Company, and Santa Fe Pacific Railroad Company.

Mr. Maxwell Evarts, with whom *Mr. Robert S. Lovett* was on the brief, for appellant, Southern Pacific Company.

Mr. Joseph H. Call, Special Assistant to the Attorney General, and *Mr. Llewellyn A. Shaver*, Solicitor for the Interstate Commerce Commission, for the Commission.

MR. JUSTICE PECKHAM delivered the opinion of the Court.

Although there are separate proceedings in these various cases, the question arising in all is identical and the cases will hereafter be spoken of as if there were but one proceeding before the court. The single question presented is, has the carrier that takes the fruit from the shipper in California the right, under the facts herein, to insist upon the rule permitting such carrier to route the freight at the time it is received from the shipper?

The Commission has decided that the carrier has not the right, and that the rule denies to shippers the use of their transportation facilities, which such shippers are entitled to, and that in its application, by the initial carriers to the fruit traffic, the shippers are subjected to undue, unjust and unreasonable prejudice and disadvantage, and the carriers are given an undue and unreasonable preference and advantage. If this be the necessary effect of the rule, it may be assumed to be a violation of section 3 of the

Interstate Commerce Act, and the Commission, therefore, rightly ordered the carriers to desist from observing it.

By section 16 of the act, the Circuit Court is given authority to enforce "any lawful order or requirement of the Commission." If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined.

The Commission does not find that any contract existed between the initial carrier and its eastern connections to bill the fruit according to certain proportions among the connecting railroads. The Commission said:

"The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they in turn connecting with numerous other carriers, as shown by the tariff, are able by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

Such statement simply shows that if any eastern railroad, with which an agreement for joint through rates existed, should give rebates on the joint through rate tariff, thus carrying freight below the rates agreed upon as the through rate tariff, that road would not get the freight.

We see nothing in the initial carrier endeavoring to maintain the rates agreed upon as a through rate tariff, and thereby preventing the payment of rebates, which in itself is a violation of the act. The act especially prohibits, in the sixth section, any alteration of the rates agreed upon, in favor of any person or persons. There is no finding that there has in fact, as a result of the rule, been any discrimination or unjust action as between the initial carriers and the shippers themselves, and there is no evidence that any was ever practiced.

In the examination of the rule it is well to bear in mind the situation of the companies and the business at the time of its adoption. It is fully set forth in the foregoing statement of facts. The payment of the rebates was a shame and was in truth unsatisfactory to all the railroads, besides being plainly a violation of the Commerce Act.

We think there is nothing in the act which clearly prohibits the roads from adopting the rule in question. The decision turns

upon the construction of a statute which at least does not in terms prohibit.

In cases such as this a court is bound to consider the bearing of the result of either construction upon the general purposes of the act. In enacting the Commerce Act this court has stated that the object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197.

The importance of the rule in this case, so far as the shipper is concerned, is not so great as is its importance to the railroads in preventing rebates. If the right of routing be looked at alone, without any connection with the claimed right of diverting the freight, the rule itself would be generally of little importance to the shipper. In all probability the freight gets to its destination when routed by the carrier as early as if routed by the shipper, and in that event the particular route taken is not very important to the latter. The evidence before the Circuit Court shows that the routing, when done by the carrier, was fairly apportioned among the eastern connections, having an eye to good service and expedition, and the roads that the routing was done over were the best roads in the country; the roads that have been eliminated were the roundabout roads; there were no roads that were insolvent, so far as known by the witnesses. Now, as the fact appears that the actual routing is generally conceded the shipper, and also his request for a diversion allowed, there is nothing in the mere right of routing by the companies, separate from other facts, of which the shipper can properly complain. The Commission says it does not distinctly appear in testimony that a delivery by a particular terminal road has been denied in any particular case, yet the manifest evil results of an arbitrary application of the rule must be considered in determining its legality. If there is no such arbitrary application, we do not agree that the rule itself is to be held illegal, because a violation of the act may be committed, while the evidence is that none in fact was committed. It does appear that the mere existence of the right to route on the part of the company has ended the practice of rebating. But the opportunity to obtain rebates on the part of the shipper is surely not a ground for action by the Commission or by the court. Of course, if in attempting to cut off rebates there is a violation of the act, the act must be followed, and that means of prohibiting

them must be abandoned. Courts may well look with some degree of care before so construing a statute, which confessedly does not in terms so provide, as to prohibit such a rule on the ground that it would be a violation of the statute. We are of opinion that the rule is not a violation thereof.

It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The Commerce Act recognizes such right and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies, and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who between each other might be regarded as competing roads.

It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. *Atchison &c. R. R. Co. v. Denver &c. R. R. Co.*, 110 U. S. 667; *Louisville & Nashville R. R. Co. v. West Coast Naval Stores &c. Co.*, 198 U. S. 483. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon, at least so long as they are reasonable and do not otherwise violate the law. In this case the initial carrier guarantees the through rate but only on condition that it has the routing. It was stated by the late Mr. Justice Jackson of this court, when Circuit Judge in the case of *Texas &c. R. R. Co. v. Interstate Commerce Commission*, 43 Fed. Rep. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and gen-

erally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

This statement was approved by this court in *Cincinnati &c. R. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 197.

Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the Commerce Act which forbids the agreement with such a condition therein as to routing. It is said that the sixth section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so.

The fact that the rate, when agreed upon, must be filed with the Commission and made public by the common carriers when directed by the Commission, does not prevent the adoption of an agreement for a through rate tariff with the condition as stated. Nor does the provision granting power to the Commission to prescribe forms of schedules of rates, as provided for in the sixth section, have any such effect. Where there is an agreed through rate tariff, and as part of such agreement, which is joined in by several railroads, the right to route cars is reserved to the initial carrier, we do not think that the shipper, by virtue of the sixth section, has the right to ignore the condition which is part of the agreement under which the through rate is made and is guaranteed.

We cannot see that the rule violates the third section of the act. All the facts referred to by the Commission are nothing but statements as to how, under such a rule, there might occur a violation of that section, but we find nothing in the facts stated by the Commission, showing that such violation had occurred. In truth, the companies did not always even enforce the rule, still less did they discriminate against shippers or in favor of carriers. On the contrary, the Commission stated that "while the initial carriers do not always route as requested by the shippers, they generally comply with their request." The mere failure to do so does not, however, prove a violation of the section.

The right to route is also complained of because the rule confined it to the fruit business, and therefore it was, as contended, a discrimination against those engaged in it or against the traffic itself. The transportation of this fruit is a special business, large interests are involved in it, and particular pains are taken to transport it as speedily as possible. With regard to all other freight it has substantially nothing in common. The cases are wholly unlike, and there has been no proof or complaint as to rebates being given

in connection with other freight, and the witnesses for the railroad state if there were any evidence or complaint of such rebates, the same rule as to routing would be immediately adopted. As has been said, there is no pretense of discrimination under this rule between the shippers of freight themselves. There seems to be unanimous agreement that all shippers are treated alike and are granted the same privileges, and the routing is generally accorded them. It is the power to route, which rests with the initial carrier, that really takes away the motive for a rebate in the manner indicated, and, therefore, the granting of the request of the shipper as to a particular route may be, and is, generally conceded without danger that the rebate business may be again practiced.

The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract the carrier may make such terms as it pleases, at least so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein and that it does not violate the third section of the act.

Because opportunities for the violation of the act may occur, by reason of the rule, is no ground for holding as a matter of law that violations must occur, and that the rule itself is therefore illegal. We are, consequently, unable to concur in the view taken by the Commission that the rule violates the third section of the act.¹

CHARLESTON AND WESTERN CAROLINA RAILWAY
COMPANY v. THOMPSON.

234 U. S. 576 (1914).

The facts are stated in the opinion.

Mr. F. Barron Grier and *Mr. W. K. Miller*, with whom *Mr. T. P. Cothran* was on the brief, for plaintiff in error.

Mr. William H. Fleming for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

¹ See section 5, paragraph 5, of Act of June 18, 1910 (36 Stat. 539, 553). — ED.

The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina to Georgia. The railroad pleaded that she was traveling on a free pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, § 1, as wife of an employé. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover. This was refused and was made a ground for a motion for a new trial, referring to the act of Congress. The motion was overruled seemingly on the notion that by the state law the defendant was liable within the conditions of the free pass. The Court of Appeals held such a stipulation binding in a free pass, but held that the Hepburn Act created an exception and that a so-called free pass under that act issued to a member of an employé's family really was not a free pass but was issued upon consideration of the services of the employé. After this writ of error was taken it modified its statement so as to say that the jury might infer that the pass was issued for value. But no such issue was before the jury as the defence had been excluded altogether, and apart from other objections we are of opinion that the change does not help the decision. The railroad company assigns the construction of the Court of Appeals and the two rulings below as error. There is a motion to dismiss but we are of opinion that a question is presented under the act.

The main question is whether when the statute permits the issue of a 'free pass' to its employés and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by § 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratuitous in the same sense to

SOUTHERN PACIFIC COMPANY v. INTERSTATE
COMMERCE COMMISSION.

SOUTHERN CALIFORNIA RAILWAY COMPANY
v. SAME.

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY v. SAME.

SANTA FE PACIFIC RAILROAD COMPANY
v. SAME.

SOUTHERN PACIFIC COMPANY v. SAME.

200 U. S. 536 (1906).¹

Prior to January 1900 there were in force over the Southern Pacific and the Santa Fe systems (hereafter called the initial carriers) through rates on citrus fruit from California to the East. Rivalry among connecting carriers to obtain this California fruit freight business led to systematic rebates to shippers to induce routing over the rebating roads. To end this practice, the initial carriers and several connecting carriers agreed upon a new through tariff, reserving the right to the initial carriers to route the goods beyond their own terminals. This new tariff was published to take effect January 1, 1900. On February 26, 1900 proceedings were commenced before the Interstate Commerce Commission, under sections 13, 14, 15 of the Interstate Commerce Act, on the part of corporations engaged in the business of shipping oranges and other citrus fruit from southern California to the Eastern markets to restrain the enforcement of the rule reserving to initial carriers the right to route. After hearing, the Commission (the chairman, Mr. Commissioner Knapp, dissenting) ordered the defendant carriers to cease from exacting from shippers the right themselves to make the route which the freight should take.

The initial carriers, believing the Commission had erred in its decision, refused to obey the order which it made, and thereupon the Commission, pursuant to the sixteenth section of the act, filed its bill in the Circuit Court for the purpose of enforcing its order.

¹ The facts have been briefly restated. — Ed.

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In dealing with the questions of law arising from this state of facts, the court held, first, that the Hepburn Act does not forbid a carrier from giving free interstate transportation to Railway Mail Service employes when not on duty and when traveling for their own benefit or pleasure, and, secondly, "Though the construction which we have given the Hepburn Act should not be correct, and though it was unlawful for the appellant to give, and the deceased to receive, free transportation on his commission, when he was not on duty, yet we are also of the opinion that, under all the circumstances of the case, the appellant, having undertaken and assumed to carry and transport the deceased as a passenger by reason of the commission, cannot escape liability for the consequences of its negligence on that ground." And again: "We are of the opinion that when a common carrier accepts a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence, and skill, which, as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty resulting in injury by urging that the pass or commission was issued, or the gratuitous passage permitted, by him, in violation of law." As authority for this proposition the court cited *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; *Del., Lack. & Western R. R. Co. v. Trautwein*, 52 N. J. Law, 169; 7 L. R. A. 435; 5 Am. & Eng. Encyc. Law (2d ed.), 508, and other authorities.

It is plain that the decision adverse to the plaintiff in error was upon two independent grounds, the second ground being avowedly based upon the hypothesis that the court might be wrong in its decision upon the first.

Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employes of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is of course a Federal question.

But whether — assuming that question to be answered in the affirmative — the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an act of Congress regulating the matter) a question not of Federal but of state law.

It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a Federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according

to circumstances. *Murdock v. City of Memphis*, 20 Wall. 590, 635, 636; *De Saussure v. Gaillard*, 127 U. S. 216, 234; *Hale v. Akers*, 132 U. S. 554, 565; *Hopkins v. McLure*, 133 U. S. 380; *Johnson v. Risk*, 137 U. S. 300; *Beaupre v. Noyes*, 138 U. S. 397; *Hammond v. Johnston*, 142 U. S. 73, 78; *Giles v. Teasley*, 193 U. S. 146, 160; *Allen v. Arguimbau*, 198 U. S. 149, 154; *Leathe v. Thomas*, 207 U. S. 93, 98. In *Murdock v. City of Memphis* and *Beaupre v. Noyes* this court affirmed the judgments of the state court. In the other cases cited the writs of error were dismissed without considering the Federal questions.

Except for two contentions of the plaintiff in error now to be mentioned, a dismissal of the writ of error would necessarily follow in the present case, since the second ground of decision adopted in the state court is manifestly independent of the first and is fully sufficient to support the judgment; and except for what follows it involves no question of Federal right.

It is insisted (a) that there is no presumption that the railroad company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that the evidence is before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a mixed question of law and fact so that it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded. *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, 591; *Cedar Rapids Gas Co. v. Cedar Rapids*, 223 U. S. 655, 668; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261. We also agree there is no presumption that the railroad company gave free transportation, and that this was a fact to be established by evidence. Accepting the duty to review this question of fact, we have examined the evidence in the record and find that it fairly supports the conclusion of the state court that the deceased was accepted by plaintiff in error as a gratuitous passenger.

But, finally, it is argued (b) that it was beyond the power of the state court to "read into the Hepburn Act an exception in favor of gratuitous passengers"; thereby (as is said) enlarging

the class to whom Congress limited the right of free interstate transportation. This is ingenious, but, as we think, unsound. As applied to the concrete case, it is equivalent to saying that the operation of the Hepburn Act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety because the carrier has voluntarily undertaken the burden of such care. But the act itself declares what penalty shall be imposed for a violation of its prohibition: "Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass or free transportation, shall be subject to a like penalty." This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate carriage. The deceased no more forfeited his life, limb or safety, and no more forfeited his right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage was not derived, according to the law of Utah, from the contract made between him and the carrier, and therefore was not deduced from the supposed violation of the Hepburn Act. It arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the State in this regard.

It results that the judgment under review must be affirmed, irrespective of the question whether the Hepburn Act forbids the giving of free interstate transportation to the employés of the Railway Mail Service when not on duty.

Judgment affirmed.

2. EQUALITY OF SERVICE.

WIGHT v. UNITED STATES.

167 U. S. 512 (1897).

SECTION 2 of the interstate commerce act reads:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." Act of February 4, 1887, c. 104, 24 Stat. 379.

Section 10 of the act as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, makes the violation of any of the provisions of the act a misdemeanor and subject to punishment. On October 8, 1894, an indictment was found in the District Court of the United States for the Western District of Pennsylvania, charging the defendant with a violation of said section 2. The trial resulted in a verdict and judgment against him, to reverse which this writ of error was sued out.

In their brief his counsel make this statement of facts:

"The undisputed facts proved in evidence are as follows: F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburgh; he purchased his beer in Cincinnati in carload lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburgh, Cincinnati and St. Louis Railroad Company, known as the 'Pan-handle,' and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-handle Railroad for this service from Cincinnati to the warehouse was fifteen cents per hundred pounds. The station of the

Baltimore and Ohio Railroad Company in Pittsburgh was at some distance from Bruening's warehouse, and there was no track connection between the Baltimore and Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore and Ohio route it was necessary to haul it in wagons from the Baltimore and Ohio station to the warehouse. The rate charged by the Baltimore and Ohio route between Cincinnati and Pittsburgh, on beer in carloads, was likewise fifteen cents per hundred pounds.

"In the month of June, 1892, agents of the Baltimore and Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with Mr. Bruening, by which it was agreed that, if Bruening would ship his beer via the Baltimore and Ohio route from Cincinnati to Pittsburgh, the railroad company would make the same delivery at the door of his warehouse that was made by the Pan-handle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterward, it was found that the cost to the railroad company for this hauling would be three and one half cents per hundred pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August and September, 1892. During these months Bruening made large shipments of beer in carloads via the Baltimore and Ohio route, paid the charge of fifteen cents per hundred pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for three and one half cents per hundred pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening; it was not questioned that the three and one half cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Pan-handle Railroad, and at the same charge of fifteen cents per hundred pounds.

"During the continuance of this arrangement with Bruening, as shown in the evidence, the Kaufman Brewing Company of Cincinnati made several shipments of beer in carloads by the Baltimore and Ohio route, on bills of lading in the form shown at pages 73, 74 and 75 of the record. Each of these shipments was consigned to the 'Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburgh, Pa., to order of shipper,' and

was taken at the fifth class rate of fifteen cents per hundred pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburgh, whose warehouse was near the station of the Baltimore and Ohio Railroad Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading, and, on presenting it and paying fifteen cents per hundred pounds, received the beer, which he hauled to his warehouse at his own expense."

Mr. Hugh L. Bond for plaintiff in error. *Mr. John K. Cowen* was on his brief.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Accepting the statement of facts made by the defendant as correct (and there is nothing in the statement which makes to his prejudice, or omitted from that statement which would be to his advantage), we are of opinion that the verdict and judgment were right, and must be sustained. It is unnecessary to consider all the instructions given and those refused, or determine whether in those given there may or may not be some language open to criticism. In its general charge the court narrowed the case to the facts which, as stated by counsel, are undisputed, and correctly stated the law applicable to those facts. Indeed, while the question of guilt or innocence was submitted to the jury and passed upon by them, it is one rather of law than of fact, and if the court properly stated the law applicable to the facts, then the verdict was right and ought to be sustained. With reference to all other matters it is enough to say that our attention is called to no errors in the admission of testimony, and we see nothing in the instructions asked and given or asked and refused which could injuriously affect the rights of the defendant or limit the specific interpretation by the court of the rules of law applicable to those facts.

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore and Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which for

fifteen cents per hundredweight it would bring the beer from Cincinnati and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him three and one half cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road, and could get the beer delivered over that road at his warehouse for fifteen cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburgh, and charging him fifteen cents therefor. Mr. Wolf had no siding connection with the rival road, and, therefore, had to pay for his cartage by whichever road it was carried. His warehouse was in a direct line 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore and Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting by whichever road he transported; that, therefore, the traffic was not "under substantially similar circumstances and conditions" within the terms of section 2. We are unable to concur in this view. Whatever the Baltimore and Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the fifteen cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether if one shipper has a siding connection with the road of a carrier it cannot

run the cars containing such shipper's freight on to that siding and thus to his warehouse at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburgh was precisely alike for each. The one shipper paid fifteen cents a hundred; the other, in fact, but eleven and a half cents. It is true he formally paid fifteen cents, but he received a rebate of three and a half cents, and regard must always be had to the substance and not to the form. Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback or other device" to charge, demand, collect or receive from any person or persons a greater or less compensation, etc. And section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the District Court is

Affirmed.

MR. JUSTICE WHITE concurs in the judgment.

INTERSTATE COMMERCE COMMISSION *v.* ALABAMA
MIDLAND RAILWAY COMPANY.

168 U. S. 144 (1897).

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there was a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

The general ground of complaint was, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminated in their rates against the former, and gave the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony related, were:

1. That the Alabama Midland Railway and the defendant roads forming lines with it from Baltimore, New York and the East to Troy and Montgomery charged and collected a higher rate of shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer distance point by fifty-two miles.

2. That the Alabama Midland Railway and Georgia Central Railroad and their connections unjustly discriminated against Troy and in favor of Montgomery in charging and collecting \$3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only \$3.00 per ton on such shipments to Montgomery, the longer distance point by both of said roads; and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland had to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminated against Troy and in favor of Montgomery, in that the rate per

hundred pounds from Troy is forty-seven cents, and that from Montgomery, the longer distance point, is only forty cents, and that such shipments from Montgomery over the road of the Alabama Midland had to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so called "jurisdiction" of the Southern Railway and Steamship Association to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower

~~rate was charged than the regular published tariff~~
 236. ICC v. Ala Midland RR Co. 168 US. 144
 #4 provides that it shall be unlawful for any
 cc. subject to the provisions of this act to
 charge any greater compensation in the aggregate
 for the transportation of passengers etc for
 a shorter than for a longer distance over the same
 line in the same direction the shorter being in-
 cluded in the longer, except where authorized by
 ICC. Rates charged to Troy and to Montgomery (wh
 is further on in the same direction from Troy) were
 alleged to be discriminatory w/ this section in
 as much as charge from X to Troy was greater than
 charge to Montg. a further distance from X. Defence
 that at Mong there was competition so that the
 two towns were not under similar circumstances
 wh must be true in order to convict of discriminat
 under #4.
 Complaint of ICC for violating orders imposing non-
 discriminatory rates dismissed. "under similar
 circumstances" of #2 refers to matters of carriage
 and does not include competition b/w rival routes
 as to wh the fact of competition is a matter wh
 may legitimately affect rates under #4. It may be
 given reasonable consideration.

any greater compensation in the aggregate for services rendered
 in such transportation than is specified, as follows, to wit:

1. On class goods shipped from Louisville, Kentucky; Saint
 Louis, Missouri, or Cincinnati, Ohio, to Troy aforesaid, no higher
 rate of charge than is now charged and collected on such ship-
 ments to Columbus, Georgia, and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Mont-
 gomery, Alabama, to New Orleans, Louisiana, no higher rate of
 charge than fifty cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore or other Northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the Commission thereupon filed this bill of complaint in the Circuit Court of the United States for the Middle District of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed, and complainant, the Interstate Commerce Commission, appealed the cause to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said Circuit Court of the United States for the Middle District of Alabama was in all things duly affirmed; and from this judgment and decree the appellant appealed to this court.

Mr. L. A. Shaver and *Mr. Assistant Attorney General Whitney* for appellant.

Mr. George F. Edmunds, on behalf of the appellant.

Mr. Edward Baxter for appellees.

Mr. A. A. Wiley filed a brief for appellees and for the Savannah, Florida and Western Railway Company.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

* * * * *

Whether competition between lines of transportation to Montgomery, Eufaula and Columbus justifies the giving to those cities

a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended, in the briefs filed on behalf of the Interstate Commission, that the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the Commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case; for the record discloses that the Commission made some allowances for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the Commission in its order made due allowance for such dissimilarity.

So, too, in *In re Louisville & Nashville Railroad*, 1 Int. C. C. Rep. 31, 78, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia v. Clyde Steamship Co.*, 5 Int. C. C. Rep. 326, the Commission somewhat modified their holding in the *Louisville and Nashville Railroad Company* case, just cited, by attempting to restrict the competition, that it is allowable to consider, to the

cases of competition with water carriers, competition with foreign railroads, competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: *Ex parte Koehler*, 31 Fed. Rep. 315; *Missouri Pacific Railway v. Texas & Pacific Railway*, 31 Fed. Rep. 862; *Interstate Com. Com. v. Atchison, Topeka &c. Railroad*, 50 Fed. Rep. 295; *Same v. New Orleans & Texas Pacific Railroad*, 56 Fed. Rep. 925, 943; *Behlmer v. Louisville & Nashville Railroad*, 71 Fed. Rep. 835; *Int. Com. Com. v. Louisville & Nashville Railroad*, 73 Fed. Rep. 409.

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Railway*, 11 App. Cas. 97; *Phipps v. London & North Western Railway*, 2 Q. B. D. 1892, 229.

But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In *Interstate Com. Commission v. Baltimore & Ohio Railroad*, 145 U. S. 263, it was said, approving observations made by Jackson, Circuit Judge, (43 Fed. Rep. 37,) that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibi-

tion of the statute, only such as are unjust or unreasonable;" and, accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the first section of the act to regulate commerce; nor make "an unjust discrimination" against him within the meaning of the second section; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section.

In *Texas & Pacific Railway v. Interstate Com. Com.*, 162 U. S. 197, it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges, made at a low rate to secure foreign freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and

conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of *Wight v. United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase "under substantially similar circumstances and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes.

This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation — among which we find the fact of competition when it affects rates.

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration. . . .

TRIER v. CHICAGO, ST. PAUL, MINNEAPOLIS &
OMAHA RAILWAY COMPANY *ET AL.*

30 I. C. C. 352 (1914).

Hans Trier for complainant in person.
Charles C. Walton for Chicago, St. Paul, Minneapolis & Omaha
Railway Company.

REPORT OF THE COMMISSION.

243. *Trier v. Chicago St. Paul* 30 ICC.352.

Minn. had a 2¢ fare. For thru tickets over the Burlington to Minn and over the So. Pac to X in Minn. the plf paid more than wd have been charged for separate tickets over Burlington at its rate and over the So. Pacific at the rate prescribed for intrastate commerce. Plf seeks to recover the difference. By ICA it is unlawful to charge a greater amount for a thru rate than the aggregate of the intermediate rates subject to the provisions of this act.

J for df. Fares established in a state do not become subject to the provisions of the act to regulate commerce until they have been adopted as their own by carriers (not so here where the rates charged plf were scheduled for the trip taken) and until the fares have been filed with ICC. Otherwise state cd regulate interstate charges.

passenger fares to the scale required by the state statute enacted for local or for interstate transportation. Effective November 1, 1913, by tariffs duly filed with this Commission, fares between points on the Northern Pacific Railway in Minnesota which conform to the state statute were made applicable to such portions of the route of interstate transportation as lie wholly within Minnesota. These fares are now in effect. It appears, also, that on account of fares charged by it for Minnesota intrastate journeys since May 1, 1907, so far as such fares were higher than were authorized by state statute, the Northern Pacific Railway Company owes, or has paid, reparation in the exact amount of the difference between the two scales.

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REPORT OF THE COMMISSION.

DANIELS, *Commissioner*:

This is a passenger fare case. It involves the question: To what extent state-established rate scales not acquiesced in by the carriers are *per se* controlling as gauging the reasonableness and justice of fares for an interstate journey where one stretch of such journey lies wholly within the state that has prescribed said rate scales. The complaint arises from the conditions which existed in the state of Minnesota from May 1, 1907, until November 1, 1913. The parties agree upon the facts and submit for our determination the questions of law.

By law in Minnesota the maximum fare for the transportation of adult passengers over the lines of the Northern Pacific Railway between points wholly within that state has been 2 cents per mile since May 1, 1907. The Supreme Court, in its decision of the *Minnesota Rate cases*, 230 U. S., 352, June 9, 1913, held that the Northern Pacific Railway Company had not shown that this rate scale was confiscatory so far as the company was concerned. Prior to that decision the carrier named did not conform its passenger fares to the scale required by the state statute either for local or for interstate transportation. Effective November 1, 1913, by tariffs duly filed with this Commission, fares between points on the Northern Pacific Railway in Minnesota which conform to the state statute were made applicable to such portions of the route of interstate transportation as lie wholly within Minnesota. These fares are now in effect. It appears, also, that on account of fares charged by it for Minnesota intrastate journeys since May 1, 1907, so far as such fares were higher than were authorized by state statute, the Northern Pacific Railway Company owes, or has paid, reparation in the exact amount of the difference between the two scales.

November 15, 1912, complainant bought a through ticket from Clinton, Iowa, to Henning, Minn., for which he paid the regularly published joint fare of the carriers interested, \$11.50. This ticket entitled him to transportation, which he received, over the line of the Chicago, Burlington & Quincy Railroad from Clinton, Iowa, to St. Paul, Minn., and thence over the line of the Northern Pacific Railway to destination in Minnesota. At that time, by tariff duly filed with this Commission, the fare of the Burlington road from Clinton to St. Paul was \$6.28, and the fare of the Northern Pacific Railway from St. Paul to Henning, duly filed with this Commission as applicable to interstate transportation, was \$5.19. The joint fare charged by the Burlington and Northern Pacific Companies, therefore, exceeded by 3 cents the sum of the intermediate fares separately established by them as applicable to through transportation.

November 17, 1912, complainant traveled from Wadena, Minn., to Hudson, Wis., and paid the regularly published and filed joint fare, \$5.64, for the through transportation. The route of travel was over the line of the Northern Pacific Railway from Wadena, Minn., to St. Paul, and thence over the line of the Chicago, St. Paul, Minneapolis & Omaha Railway to Hudson. At that time the fare of the Northern Pacific Railway from Wadena to St. Paul, duly filed with this Commission and applicable to interstate transportation, was \$4.74, and the fare of the Omaha Railway from St. Paul to Hudson was 60 cents. The charge for this latter through transportation, therefore, was 30 cents in excess of the intermediate fares subject to the provisions of the act to regulate commerce.

The slight differences pointed out above between the aggregates of the intermediate fares and the through fares are not, however, the particular matters of which complaint is made. It is averred that the legal passenger fare of the Northern Pacific Railway from St. Paul to Henning was in November, 1912, and still is, \$3.56; and that the legal passenger fare via the same carrier from Wadena to St. Paul was at that time, and still is, \$3.18. It is alleged that the charges made by the defendants for through transportation were unreasonable and unjust in and to the extent that they exceeded the aggregates of these passenger fares established by law within the state of Minnesota, between St. Paul and Henning and between Wadena and St. Paul, and the interstate charges between Clinton and St. Paul and between St. Paul and Hudson. Upon these allegations complainant demands rep-

aration in the sum of \$3.52, \$1.66 of which is attributable to excess in fare to Henning and \$1.86 to excess in fare to Hudson. It is to be noted that these averments are not allegations of fact, but are conclusions of law made by the complainants; they are not citations of regularly published tariff rates subject to the provisions of the act to regulate commerce; and it is upon these conclusions alone that the complaint rests. From the record, we are required to gauge the reasonableness and justice of the joint interstate rates for the through transportation here in issue solely from the facts above recited.

Without attempting to analyze the decision of the Supreme Court cited above, it is sufficient to say that it does not specifically find that the maximum passenger fare of 2 cents per mile is reasonable or unreasonable between points in Minnesota on the Northern Pacific Railway. That decision held, in the cases of the Northern Pacific and Great Northern companies, "that the proof is insufficient to justify the finding that the rates were confiscatory * * *." For this reason the court dismissed the bill of the Northern Pacific Railway Company without prejudice. Neither that decision nor the statute of Minnesota established any fare for interstate transportation; nor was the necessary effect of that decision or of the state statute to establish any division, portion, or basing fare applicable to interstate transportation between points beyond the state of Minnesota and points within that state. Neither the Minnesota statute nor the decision of the Supreme Court established in accordance with the terms of section 6 of the act to regulate commerce the fare of 2 cents per mile as the maximum lawful fare for travel in an interstate journey on the stretch thereof which lay within Minnesota; and, therefore, that 2-cent-per-mile fare is not involved under section 4 of the act. That section has these specific terms:

"That it shall be unlawful for any common carrier, subject to the provisions of this act * * * to charge any greater compensation as a through rate than the aggregate of the intermediate rates *subject to the provisions of this act.*"

Fares established by the law of a state do not become subject to the provisions of the act to regulate commerce until they have been adopted as their own and as applicable to interstate transportation by the carriers, and until said fares have been filed with this Commission, as applicable to interstate transportation, in accordance with the requirements of section 6 of the act; or until such fares have been lawfully imposed upon the carrier as applica-

ble to interstate transportation and duly filed with this Commission. This must be so, as otherwise each state could by its local legislative enactment at once vary the charges applicable to interstate transportation without notice to this Commission and thus practically nullify section 6 of the act. The Commission, while it should give due and proper weight to the determinations of state legislatures and commissions, can not be controlled in its judgment upon the reasonableness of interstate rates and fares by the independent action of a state legislature or a tribunal not federal. Otherwise it would seem necessarily to follow that in case a state legislature should establish a minimum fare per mile for intrastate passenger journeys at a rate in excess of the previous average rate per mile for interstate journeys, a higher aggregate charge for said interstate journeys would immediately become operative. In this fashion any substantial control over interstate passenger rates would practically be withdrawn from this Commission. Cf. *Savannah Bureau of Freight v. C. & S. R. Ry. Co.*, 7 I. C. C., 601, 611.

* * * * *

INTERSTATE COMMERCE COMMISSION v. BALTIMORE AND OHIO RAILROAD COMPANY.

145 U. S. 263 (1892).¹

The Interstate Commerce Commission found that "party-tickets" issued by the Baltimore & Ohio Railroad, *i. e.*, tickets to parties of ten or more at a reduced rate for each than that charged to single passengers between the same points, constituted an unjust discrimination and ordered the railroad to cease their issuances. Upon the railroad's refusal to obey the order the Commission brought a bill in the Circuit Court for the Southern District of Ohio for enforcement of its rule. Upon hearing before the Circuit Court upon pleadings and proofs the bill was dismissed. 43 Fed. Rep. 37. From this decree the Interstate Commerce Commission appealed to this Court.

¹ The facts have been briefly restated. — Ed.

Mr. Samuel Shellabarger and Mr. Alfred G. Safford (with whom were Mr. Attorney General and Mr. J. M. Wilson on the brief) for appellant.

Mr. John K. Cowen and Mr. Hugh L. Bond, Jr., for appellee.

MR. JUSTICE BROWN delivered the opinion of the court.

Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; *Fitchburg Railroad Co. v. Gage*, 12 Gray, 393; *Baxendale v. Eastern Counties Railway Co.*, 4 C. B. (N. S.) 63; *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 South Car. 38; *Johnson v. Pensacola Railway Co.*, 16 Florida, 623; though the weight of authority in this country was in favor of an equality of charges to all persons for the same service.

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ICC v. B. & O. 145 U.S. 263.

Bill for the enforcement of the rule of the ICC to dissist from the dfrs practice of issuing at less than the regular rates for the same number of single tickets, tickets for ten persons in a party. Held No discrimination, but merely sale of services at wholesale. "In order to constitute an unjust discrimination under #2 the carrier must charge or receive from one person a greater compensation than from another, or secure the same indirectly but however done it must be for a "like and contemporaneous service ..under substantially similar circumstances"

particular locality or community, or of some local trade or commercial connection, or for the destruction or crippling of some rival or hostile line.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or locali-

ties; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburg; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by section 2 to make an unjust discrimination. Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust. We agree, however, with the plaintiff in its contention that a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination or an unreasonable preference under sections 2 and 3. As was said by Mr. Justice Blackburn in *Great Western Railway Co. v. Sutton*, L. R. 4 H. L. 226, 239: "When it is sought to show that the charge is extortionate as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge during the period throughout which the party complaining was charged more under the like circumstances."

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party-rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation

ticket" seem to have no definite meaning. They are defined by Webster (edition of 1891) as "a ticket, as for transportation, which is the evidence of a contract for service at a reduced rate." If this definition be applicable here, then it is clear that it would include a party-rate ticket. In the language of the railway, however, they are principally, if not wholly, used to designate tickets for transportation during a limited time between neighboring towns or cities and suburban towns. The party-rate ticket upon the defendant's road is a single ticket issued to a party of ten or more, at a fixed rate of two cents per mile, or a discount of one-third from the regular passenger rate. The reduction is not made by way of a secret rebate or drawback, but the rates are scheduled, posted and open to the public at large.

But, assuming the weight of evidence in this case to be that the party-rate ticket is not a "commutation ticket," as that word was commonly understood at the time of the passage of the act, but is a distinct class by itself, it does not necessarily follow that such tickets are unlawful. The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; inmates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the act. It may even admit of serious doubt whether, if the mileage, excursion or commutation tickets had not been mentioned at all in this section, they would have fallen within the prohibition of sections 2 and 3. In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles, or to go and return by the same road, is a "like and contemporaneous service

under substantially similar conditions and circumstances" as is rendered to a person who travels upon an ordinary single-trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.

But whether these party-rate tickets are commutation tickets proper, as known to railway officials or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: "The difference between commutation and party-rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party-rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured."

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveller the thousand-mile ticket was issued; to meet the needs of the suburban resident or frequent traveller, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists travelling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an

established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others. These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. If, for example, a railway makes to the public generally a certain rate of freight, and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to every one doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business, and enable the larger ones to drive them out of the market.

The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of the single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another. If it be lawful to issue these tickets, then the Pittsburgh, Chicago and St. Louis Railway Company has the same right to issue them that the defendant has, and may compete with it for the same traffic; but it is unsound to argue that it is unlawful to issue them because it has not seen fit to do so. Certainly its construction of the law is not binding upon this court. The evidence shows that the amount of business done by means of

these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.

In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a "like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.

In this connection we quote with approval from the opinion of Judge Jackson in the court below: "To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions. In respect to passenger traffic, the positions of the respective persons, or classes, between whom differences in charges are made, must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality resulting in undue advantage to one, or undue disadvantage to the other, in order to constitute unjust discrimination."

The English Traffic Act of 1854 contains a clause similar to section 3 of the Interstate Commerce Act, that "no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or

any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

In *Hozier v. Caledonian Railway*, 17 Sess. Cas. (2d Series) 302, (S. C. 1 Nev. & Macn. Railway Cases, 27,) complaint was made by one who had frequent occasion to travel, that passengers from an intermediate station between Glasgow and Edinburgh were charged much greater rates to those places than were charged to other through passengers between these termini; but the Scotch Court of Session held that the petitioner had not shown any title or interest to maintain the proceeding; his only complaint being that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of travel than he himself could enjoy. "It provides," said the court, "for giving undue preference to parties *pari passu* in the matter, but you must bring them into competition in order to give them an interest to complain." This is in substance holding that the allowance of a reduced through rate worked no injustice to passengers living on the line of the road, who were obliged to pay at a greater rate. So in *Jones v. Eastern Counties Railway*, 3 C. B. (N. S.) 718, the court refused an injunction to compel a railway company to issue season tickets between Colchester and London upon the same terms as they issued them between Harwich and London, upon the mere suggestion that the granting the latter, the distance being considerably greater, at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. Upon the other hand, in *Ransome v. Eastern Counties Railway*, 1 C. B. (N. S.) 437, where it was manifest that a railway company charged Ipswich merchants, who sent from thence coal which had come thither by sea, a higher rate for the carriage of their coal than they charged Peterboro' merchants, who had made arrangements with them to carry large quantities over their lines, and that the sums charged the Peterboro' merchants were fixed so as to enable them to compete with the Ipswich merchants, the court granted an injunction, upon the ground of an undue preference to the Peterboro' merchants, the object of the discrimination being to benefit the one dealer at the expense of the other, by depriving the latter of the natural advantages of his position. In *Oxlade v. North-eastern Railway*, 1 C. B. (N. S.) 454, a railway company was held justified in carrying goods for one person for a less rate than that

at which they carried the same description of goods for another, if there be circumstances which render the cost of carrying the goods for the former less than the cost of carrying them for the latter, but that a desire to introduce northern coke into a certain district was not a legitimate ground for making special agreements with different merchants for the carriage of coal and coke at a rate lower than the ordinary charge, there being nothing to show that the pecuniary interests of the company were affected; and that this was an undue preference.

In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which with us would be obnoxious to the long and short haul clause of the act, or would be open to the charge of unjust discrimination. But so far as relates to the question of "undue preference," it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619.

There is nothing in the objection that party-rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people. It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy.

Upon the whole, we are of the opinion that party-rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the act to regulate commerce, and the decree of the court below is, therefore,

Affirmed.

UNITED STATES v. ERIE R. CO. (two cases).

UNITED STATES DISTRICT COURT, S. D. NEW YORK.

213 Fed. Rep. 391 (1914).

Suits by the United States against the Erie Railroad Company. Suit No. 1 was instituted by the United States against the railroad company to restrain it from issuing passes to agents of transatlantic steamship lines, and suit No. 2 to restrain it from issuing passes to the agent of the Great Eastern Railway of England. On final hearing. Decree for defendant.

John C. Knox, Asst. U. S. Atty., of New York City.

George F. Brownell, of New York City, for defendant.

Hough, District Judge. From a date prior to 1887, and continuously since that time, the Erie Railroad has been in the habit

U.S. v Erie RR. 255.

Action to restrain the df from issuing passes to transatlantic steamboat line agents and to agents of English RR wh in England issues passes to the df. The ICA forbids free passes, except that that shall not prohibit the interchange of passes by RR (1887) or other carriers (Hpburn Act) subject to the provisions of this act (1910). It is alleged that the steamboat Co and English RR not being subject to act the df cannot exchange passes with them. J for df. Statute is to be construed with reference to the object intended and the words here were not used as terms of art, and ~~xxx/xx~~ carriers wh does not mean the same as co. subject to act as expressed with regard to the permission given tel Co. to exchange passes.

the ocean carriers nor the Great Eastern Railway of England is subject to said act, although all are common carriers, within the ordinary meaning of those words.

Section 22 of the Interstate Commerce Law has from the passage of the first statute in 1887 contained these words:

"Nothing in this act shall be construed . . . to prevent the principal officers of any railroad company or companies from ex-

changing passes or tickets with other railroad companies for their officers and employés."

Since the Hepburn Act of 1906 the first section of the Interstate Commerce Law has contained these words:

"No common carrier subject to the provisions of this act, shall, after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass or free transportation for passengers: . . . Provided, that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employés of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation."

The amendment of 1910 inserted the following words (next after those above quoted):

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employés, and their families of such telegraph, telephone and cable lines, and the officers, agents, employés and their families of other common carriers subject to the provisions of this act."

The proviso of 1910 is evidently intended to cover the case of employés of cable, telegraph, and telephone lines, which were in that year brought within the purview of the Interstate Commerce Law, but I am quite unable to see any reason for the rest of said proviso.

The object of these actions is to enjoin the defendant from continuing the long-standing practice above outlined because the common carriers or railroads referred to in the quoted sections of the law must be held to mean, not common carriers and railroads generally, but "common carriers subject to the provisions of this act." These suits were laid before the Commerce Court and were dismissed without prejudice because the court was divided in opinion. Shortly after the passage of the Hepburn Act, this question came before the Interstate Commerce Commission (Petition of Frank Parmelee Co., 2 Interst. Com. Com'n R. 39), and it was there plainly held that no interchange of passes would be permitted between ordinary common carriers or common carriers at common law and "common carriers subject to the provisions of this act." The position of the Commission is in substance that the general prohibition of the Hepburn Act is only modified by the proviso to the extent of "making a special excep-

tion of the giving of passes by way of interchange to the employes of any other common carrier subject to the act." This seems to me assertion rather than reasoning, but there is really very little more to say about it. To decide this matter as one of law is making bricks without straw, for every one admits that the object of the court must be to carry out the intent of the Legislature; yet, if by "intent" is meant conscious purpose, it is, I think, a safe presumption that Congress never considered the point here involved.

In the absence of any real intent, it is the habit of courts to endeavor to ascertain whether, from the language used, an imputed intent can be spelled out. Applying this method, it is a fair query to ask whether the context indicates throughout the act that "common carriers" is to be synonymous with "common carriers subject to the provisions of this act." As amended to date, I find the following instances of the use of the phrase "common carriers" in illustrative positions: In section 1 there is a proviso:

"That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers for the exchange of services."

Here "common carriers" must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves hampered in extending their business with concerns entirely unconnected with interstate commerce.

The penal provision which is a part of the anti-pass legislation begins with the expression:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor," etc.

Here the phrase evidently refers only to carriers subject "to the provisions of this act."

The provisions of section 1 relating to private sidings and lateral branch lines declare that, "if any common carrier shall fail to install and operate any such switch," the Commission shall investigate the matter, and make an order "directing the common carrier to comply with the provisions of this section." Here evidently the phrase can refer only to carriers "subject to the provisions of this act."

Section 3, relating to interchange of traffic, does not consistently use the phrase "carrier subject to the provisions of this act"; yet I think it plain that, in every instance where the phrase "carrier" is used, it means "carrier subject to the provisions of this

act." Section 5 (the anti-pooling provision) prohibits combinations "with any other common carrier or carriers," which phrase I think is plainly intended to cover any and all carriers, whether the same be subject to the provisions of the Interstate Commerce Law or not. Section 6 (relating to published tariffs) does not always use the phrase "common carrier subject to the provisions of this act," but in my judgment it can only mean such carrier, as may be seen from the context. This is especially noticeable in the subsection relating to the expedition of military traffic in time of war, which declares that "carriers shall adopt every means within their control to facilitate and expedite the military traffic." This can only refer to "carriers subject to the provisions of this act." Section 13, which gives to "any common carrier" the right to complain of the acts or omissions of "any common carrier subject to the provisions of this act," specifically puts the two classes of carriers in contradistinction. In section 15 it is provided as proper for a common carrier to give information "to another carrier or its duly authorized agent for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers." The phrase "another carrier" must mean in many instances a carrier not subject to the provisions of this act. The reparation section (No. 16) provides that the Commission may make an order "directing the carrier to pay to the complainant the sum to which he is entitled." This, of course, can only refer to a "carrier subject to the provisions of this act," and the same may be said of the subsequent portions of the same section relating to the duty of carriers to comply with the Commission's order, the penalty upon a carrier for neglecting to obey an order, and the right of the Commission to apply for a court decree enforcing an order.

The so-called Carmack amendment to section 20 nowhere employs the phrase "carrier subject to the provisions of this act"; yet every carrier affected is in a certain sense within the provisions of the act. The language of this amendment, however, does not seem to me enlightening, because it is really new and different legislation not germane to the general purposes of the statute.

The foregoing examination of the act satisfies me that no attempt has been made to give to the phrases "common carrier" and "common carrier subject to the provisions of this act" an identical meaning, and all arguments based on such identity fail.

It is another admitted canon of interpretation that the statute is to be construed with reference to the object intended to be ac-

complished. The Interstate Commerce Law is clearly a remedial act and is to be benevolently interpreted, but it can hardly be said that it has been the intention of even its most affectionate supporters to bring all the business or all the operations of the "carriers, subject to the provisions of this act," within the compulsion of the statute. So far as many heads of legislation are concerned, it is historically known that only a small proportion of our legislators have been willing to extend the power of Congress over interstate commerce to its limit. It has hitherto been deemed sufficient to legislate over a limited field only; and I find it impossible to perceive, either in the language of the act, the history of its preparation, or the literature which has grown up around it, any clear intent to upset the settled habit, not only of this defendant, but all American carriers, of seeking or encouraging business in foreign fields, or fields not within the power of Congress, by methods which are still permissible within the congressional field of regulation. Admittedly the Erie Railroad can exchange passes with the New York Central, and why it is obnoxious to the object of the Interstate Commerce Law for the Erie to do the same thing with foreign carriers who are in business relations with it is more than I can see.

Indeed, the "object" of a statute rarely means more than a supposed governmental policy, and it has been said that such policy is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes. *Hadden v. Collector*, 5 Wall. 107, 18 L. Ed. 518.

The argument of inconvenience is easy to advance, but very misleading. In doubtful cases it is true that a statutory, construction occasioning great inconvenience or productive of inequality and injustice is not to be preferred if another and more reasonable construction can be found. *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969. It is vigorously urged here as matter of notoriety that there are already municipalities in this country which are in a sense common carriers in that (in New York and Boston) they maintain ferries for hire, and also that the United States itself is reputed to own a railway common carrier in the Canal Zone, and is about to construct and operate a similar common carrier in Alaska. On these facts the argument is based that every official of the United States from the highest to the lowest, and all the officers or employes of New York and Boston, may be favored with passes to the great detriment of the public. The jumping of such intellectual fences as these may be

left until we come to them. To my mind the argument only shows how fallacious is reasoning *ab inconvenienti*.

To sum this matter up, it is plain that the contention of the government is not to be found in the letter of the statute, nor is it discoverable in the spirit thereof, because there is no evidence of actual intent on the part of the Legislature, because, viewing the whole act, the phrase "common carrier" is not and was not intended to be synonymous with the phrase "common carrier subject to the provisions of this act," and because there is no reason shown why Congress should be thought to have given the privilege of exchanging passes with one kind of common carrier and not with another, when such exchanges are made and always have been made with all common carriers for the same reasons, viz., a desire to curry favor with persons having business to place.

If these well-known reasons no longer meet approval, if mutual backscratching has become sinful, the remedy is another statute, not stretching the present one.

Bills dismissed.

NEW YORK, NEW HAVEN AND HARTFORD RAIL-
ROAD COMPANY *v.* INTERSTATE COMMERCE
COMMISSION.

INTERSTATE COMMERCE COMMISSION *v.* CHESA-
PEAKE AND OHIO RAILWAY COMPANY.

200 U. S. 361 (1906).

The facts are stated in the opinion.

Mr. John W. Daniel, with whom *Mr. Fred Harper* was on the brief, for New York, New Haven and Hartford Railroad Company, appellant in No. 24 and appellee in No. 27.

Mr. John W. Griggs also for New York, New Haven and Hartford Railroad Company.

Mr. Randolph Harrison, with whom *Mr. A. R. Long* was on the brief, for the Chesapeake and Ohio Railway Company, appellee in No. 27.

Mr. Assistant Attorney General McReynolds, with whom *Mr. William A. Day* was on the brief, for the Interstate Commerce Commission, appellee in No. 24 and appellant in No. 27.

MR. JUSTICE WHITE delivered the opinion of the court.

Following an inquiry begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. 847), in the Circuit Court of the United States for the Western District of Virginia, this proceeding against the Chesapeake and Ohio Railway Company, a Virginia corporation, and the New York, New Haven and Hartford Railroad Company, a corporation of the State of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake and Ohio, and the New Haven. The petition averred that the Chesapeake and Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake and Ohio made a verbal agreement with the New Haven to sell to that road sixty thousand tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at \$2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate \$2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was \$1.45 per ton.

Referring to the developments before the Commission, and annexing as part thereof the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake and Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination

for two reasons: First. Because if such difference existed, it was a loss suffered by the Chesapeake and Ohio, not from taking less than its published rates, but because it had received less as purchaser than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake and Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made the New Haven had a claim exceeding one hundred thousand dollars against the Chesapeake and Ohio, arising from a previous written contract to deliver coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake and Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake and Ohio, knowing that they were in violation of the Interstate Commerce Law. The prayer was that the Chesapeake and Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal and the other from seeking to enforce it; that the Chesapeake and Ohio be enjoined from "accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported . . . at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practiced." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

A preliminary restraining order was issued conforming to the prayer of the petition. The Chesapeake and Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about sixty thousand tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was ad-

mitted that the purchase price agreed to be paid was less than the market price of the coal plus the published rates, and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about one hundred thousand dollars, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake and Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that at about the time the original contract was made arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of one hundred thousand dollars to the Chesapeake and Ohio was occasioned.

The New Haven road in its answer asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake and Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its railroad; that it had no knowledge of the price which the Chesapeake and Ohio would be obliged to pay for the coal or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery and the published rate of the Chesapeake and Ohio. It averred the validity of the agreement, the legality of the debt of one hundred thousand dollars which resulted from it, and charged that, taking that debt into consideration, the sum which is paid the Chesapeake and Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake and Ohio. It denied that there was any departure from the public rates or any discrimination, asserted that at the time the original

contract was made the price was sufficient to have enabled the Chesapeake and Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if in execution of the contract a condition arose where a loss was suffered by the Chesapeake and Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake and Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the second and sixth sections of the act to regulate commerce, forbidding the taking of less than the published rates. It, however, held that the contracts amounted to an undue discrimination and a violation of the third section of the act. The court, hence, permanently enjoined the Chesapeake and Ohio from discharging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as in general terms to command the Chesapeake and Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake and Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits and, in effect, asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must con-

sider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy as considered by the Commission on the inquiry by it conducted and as decided below, and as here presented, involves an analysis of all the dealings under both contracts and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are indisputably established, reserving such questions of fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake and Ohio, chartered by the State of Virginia, operates a road which reaches both the New River and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the State of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy between July 1, 1897, and July 1, 1902, not to exceed two million gross tons of bituminous coal to be taken from the line of the Chesapeake and Ohio road; deliveries to be made not exceeding four hundred thousand tons per annum. The price agreed upon was \$2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.¹

¹ Contract made between the Chesapeake and Ohio Railway Company and the New York, New Haven and Hartford Railroad Company.

Said Chesapeake and Ohio Railway Company, for the consideration herein-after mentioned, hereby agrees to furnish to said railroad company not to exceed two million gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding four hundred thousand tons per annum.

And said Chesapeake and Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality or if its delivery be unnecessarily delayed.

And said Chesapeake and Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake and Ohio Railway Company of all its agreements herein contained, said railroad

The Chesapeake and Ohio, not in its own name but through others who really although not ostensibly acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfill the contract which had been made with the New Haven. In consequence of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900-1901, when, because of strikes and other difficulties, delivery ceased and the New Haven bought coal in the open market and presented to the Chesapeake and Ohio a bill for the increased price which it had paid, and the Chesapeake and Ohio paid one hundred and sixty thousand dollars to cover such loss. Subsequently in 1902 further strikes supervened and deliveries again ceased, at a time when about sixty thousand tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to one hundred and three thousand dollars. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of sixty thousand tons upon the original contract might be discharged by delivery on the part of the Chesapeake and Ohio of that amount of coal from the Kanawha district at the contract price of \$2.75, and when this delivery was consummated it was agreed that the Chesapeake and Ohio would be absolutely relieved from the payment of the damage claim just referred to.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake and Ohio to Newport

company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton, New Haven basis, settlement to be made *monthly*.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this the 3d day of December, 1896.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

By M. E. INGALLS, President.

THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,

By C. E. MELLEN, Second Vice President.

For value received, I hereby guarantee that the Chesapeake and Ohio Railway Company shall not fail to deliver coal on account of strikes.

J. PIERPONT MORGAN.

News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement an individual who represented the Chesapeake and Ohio made contracts in his own name with operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake and Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly long prior to the making of the first contract the Chesapeake and Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the State of West Virginia passed "An act to prevent railroad companies from buying or selling coal or coke and to prevent discrimination." The first section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake and Ohio, when it contracted with operators in West Virginia to procure as to both contracts the coal for delivery to the New Haven, to do so not in its own name but through another.

Before applying to these undisputed facts the legal question arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake and Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence we content ourselves with

saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract and during the whole period thereof, except for a brief time, caused by a lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought then to determine whether the contract made in 1896 for the two million tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we for the moment put out of view the provisions of the West Virginia statute and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake and Ohio had obligated itself to deliver. We shall also assume for the purpose of the inquiry that the Chesapeake and Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates?

The previous decisions of this court concerning the Interstate Commerce Act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions against discrimination, favoritism or rebates, but have mainly concerned the meaning of the act in other respects, that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission,

which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the second section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons

to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately and not merely remotely to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake and Ohio, as a result of its being a dealer, had become, long prior to the adoption of the Interstate Commerce Law and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, it illustrated by the case of *The Attorney General v. The Great Northern Railway Company*, 29 Law Journal (N. S. Equity), 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public.

In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

" . . . These large companies, joint stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money — large amounts of property — and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways."

Illustrating the danger to the public, as established by the case before him, the vice-chancellor said (p. 799):

"Here we find this company, having the traffic from the north of England, where the great coal fields are (at least some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has), — but by the mode in which this company may exercise such powers as either it has or assumes to have — this company may get into their hands the traffic, that is, the dealing in all the coal in the large districts supplying coal to the country. They have to a considerable extent done so, and there is no reason why it should not go on progressing. I observe that in the eight (?) years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not — there is great danger that they may — get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interest of the public, for this reason, taking merely the article of coal."

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers as between themselves and in their dealings with the carrier would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage" and "unjust discrimination" are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and as such dealer to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(a) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to

the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer and not as a carrier. This simply asserted the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(b) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proof shows an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court below found that the proof did not justify the inference that the Chesapeake and Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake and Ohio was wholly indifferent to and did not concern itself with the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake and Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line and sold it, replying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake and Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof

leaves no doubt upon our minds that, in making the contract, the Chesapeake and Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the Interstate Commerce Act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line and thereby, as it conceived, to increase the carriage of that commodity and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake and Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake and Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake and Ohio of the economic conceptions upon which the Interstate Commerce Law rests, and a substitution in their stead of the conceptions of the Chesapeake and Ohio, as to what was best for itself and for the public. Further, as the prohibition of the Interstate Commerce Act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper times, the net published tariff of rates would have been realized by the Chesapeake and Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake and Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the Interstate Commerce Act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by decid-

ing that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depend not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

(c) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

* * * * *

We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake and Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, as thus modified, the decree below is

Affirmed.

UNITED STATES OF AMERICA, UPON THE APPLICATION OF THE ATTORNEY GENERAL, AT THE REQUEST OF THE INTERSTATE COMMERCE COMMISSION, *v.* UNION STOCK YARD & TRANSIT COMPANY OF CHICAGO.

CHICAGO JUNCTION RAILWAY COMPANY *v.*
UNITED STATES.

226 U. S. 286 (1912).

MR. JUSTICE DAY delivered the opinion of the court.¹

* * * * *

As to the Pfälzer contract, both parties concede the authority of the Commerce Court to pass upon this subject and no objection was made as to the manner and form in which the jurisdiction of that court was invoked. There being no objection taken to the method of proceeding, we think, if this contract is within the prohibitions of the act, that the Commerce Court had the right to entertain the bill and to enjoin the performance of the contract. Sections 2 and 3 of the Elkins Act. It is contended that this contract is violative of certain features of the Act to Regulate Commerce and of the Elkins Act. Section 2 of the former and § 1 of the latter provide:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

"SEC. 1. . . . It shall be unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the trans-

¹ The facts and first part of the opinion will be found on page 95, *supra*.
— Ed.

portation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. . . ."

This court has had frequent occasion to comment upon the purpose of Congress in the passage of these laws to require equal treatment of all shippers and to prohibit unjust discrimination in favor of any of them. *New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Armour Packing Co. v. United States*, 209 U. S. 56; *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467; *Chicago & Alton R. R. Co. v. Kirby*, 225 U. S. 155.

By § 2 of the Act to Regulate Commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimination is practiced. By the very terms of the contract it is evident that the interest of the Stock Yard Company and also of the Junction Company is in the profit to be made in receiving and delivering, handling and caring for and transporting live stock, shipments of which, to the extent stated, are made in interstate commerce. The contract provides that if the Pfälzers construct a packing plant adjacent to the stock yards of the Stock Yard Company they shall receive \$50,000, and it obligates them to maintain and operate the plant for a period of fifteen years and buy and use in their slaughtering business such live stock only as moves through such stock yards, and if not so bought to pay the regular charges thereon as if the same had moved into the stock yards and had been there purchased by them. In other words, this plant in effect may pay for the services of the Stock Yard Company, up to the sum of \$50,000, with the bonus given to the Pfälzers for the location of their plant in juxtaposition to the stock yards.

The only interest which the Stock Yard Company has in Pfälzer & Sons' interstate business is compensation for its services in handling their freight and its share of the profits realized by the Junction Company in rendering its service. Any other company with which it has made no contract would be compelled to pay the full charge for the services rendered without any rebate or concession. Another company might have a contract for a larger or smaller bonus, and thereby receive different treatment. Certainly as to the company which receives no such bonus there has been an undue advantage given to and an unlawful discrimination practiced in favor of Pfälzer & Sons. If these companies had filed their tariffs, as we now hold they should have filed them, they would have been subject to the restrictions of the Elkins Act as to departures from published rates — and we must consider the case in that light — and this preferential treatment, as we have said, would have been in violation of that act. It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the purpose of the act to place all shippers upon equal terms. We think the Commerce Court should have enjoined the carrying out of this contract.

It follows that in case No. 621 the judgment of the Commerce Court should be reversed and the case remanded for the entry of a decree in conformity to this opinion. In No. 622 the judgment of the Commerce Court should be affirmed.

CENTRAL STOCK YARDS COMPANY v. LOUISVILLE
& NASHVILLE RAILWAY COMPANY.

192 U. S. 568 (1904)

The facts are stated in the opinion.

Mr. Joseph C. Dodd and Mr. Wm. D. Washburn, with whom Mr. J. L. Dodd and Mr. W. M. Smith were on the brief, for appellant.

Mr. Helm Bruce, with whom Mr. Charles N. Burch and Mr. Ed. Baxter were on the brief, for appellees

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Appeals affirming a decree of the Circuit Court which dismissed the plaintiff's bill. 118 Fed. Rep. 113. The bill was brought by the appellant, a Delaware corporation, against a Kentucky corporation, to compel it to receive live stock tendered to it outside the State of Kentucky for the Central Stock Yards station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and by agreement between the two companies the Central Stock Yards are the "live stock depot for the purpose of handling live stock to and from Louisville" on the Southern Railway. The defendant, by a similar arrangement, has made the Bourbon Stock Yards its live stock depot for Louisville, and declines to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon yards. There are physical connections between the Louisville and Nashville and the Southern tracks at a point between the two stock yards, which is passed by the greater portion of the live stock carried by the Louisville and Nashville Company, and at another point which would be more convenient for delivery a little further to the northward. The details are unimportant, except that in order to deliver, as prayed, the defendant would be compelled either to build chutes or to hand over its cars to the Southern Railroad, after having made some contract for their return. The right is claimed by the plaintiff, under the Interstate Commerce Act of February 4, 1887, c. 104, § 3, 24 Stat. 379, making it unlawful for common carriers subject to the act to give unreasonable preferences, and requiring them to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of property to and from their several lines and those connecting therewith. The right is claimed also under the Constitution of Kentucky, especially § 213, requiring Kentucky railroad companies to receive, deliver, transfer and transport freight from and to any point where there is a physical connection between the tracks, as we understand it, of the railroad concerned and any other.

For the purposes of decision we assume, without expressing an opinion, that if the Act of Congress and the Kentucky Con-

stitution apply to the case they both confer rights upon the plaintiff. As to the former compare §§ 8, 9, and the act of February 19, 1903, c. 708, § 2, 32 Stat. 847, 848, *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128; *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 610, 620. The rights under the latter, which are relied upon especially, could not be established without discussion. Compare *Atkinson v. Newcastle &c. Waterworks Co.*, L. R. 2 Ex. Div. 441; *Johnston v. Consumers' Gas Company of Toronto*, [1898] A. C. 447. For the same purpose we further assume that such rights as the plaintiff has may be enforced by bill in equity. See *Interstate Stock-Yards Co. v. Indianapolis Union Railway*, 99 Fed. Rep. 472. We also lay on one side the question whether the section of the Constitution of Kentucky is or is not invalid as an attempt to regulate commerce among the States. For we are of opinion that the defendant's conduct is not within the prohibitions or requirements of either the Act of Congress or the Constitution of Kentucky, as those provisions fairly should be construed.

The Bourbon Stock Yards are the defendant's depot. They are its depot none the less that they are so by contract and not so by virtue of a title in fee. Unless a preference of its own depot to that of another road is forbidden, the defendant is not within the Act of Congress. Suppose that the Southern Railway station and the Louisville and Nashville station were side by side, and that their tracks were connected within or just outside the limits of the station grounds. It could not be said that the defendant was giving an undue or unreasonable preference to itself or subjecting its neighbor to an undue or unreasonable disadvantage if it insisted on delivering live stock which it had carried to the end of the transit at its own yard. These views are sanctioned by what was said in *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128. The fact that the plaintiff's stock yards are public does not change the case. See further *Butchers' & Drovers' Stock-Yards Co. v. Louisville & Nashville R. R.*, 67 Fed. Rep. 35.

If the cattle are to be unloaded, then, as was said in *Covington Stock-Yards Company v. Keith*, the defendant has a right to unload them where its appliances for unloading are, and cannot be required to establish another set hard by. On the other hand, if the cattle are to remain in the defendant's cars it cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract

to the defendant or to require it to make one. *Atchison, Topeka & Santa Fe R. R. v. Denver & New Orleans R. R.*, 110 U. S. 667, 680. The consensus of the Circuit Courts is to the same effect. *Kentucky and Indiana Bridge Co. v. Louisville & Nashville R. R.*, 37 Fed. Rep. 567, 629, 630; *Little Rock & Memphis R. R. v. St. Louis, Iron Mountain & Southern Ry.*, 41 Fed. Rep. 559; *Chicago & Northwestern Ry. v. Osborne*, 52 Fed. Rep. 912; *Oregon Short-line & Utah Northern Ry. v. Northern Pacific R. R.*, 61 Fed. Rep. 158, affirming S. C., 51 Fed. Rep. 465; *Little Rock & Memphis R. R. v. St. Louis Southwestern Ry.*, 63 Fed. Rep. 775; *St. Louis Drayage Co. v. Louisville & Nashville R. R.*, 65 Fed. Rep. 39; *Allen v. Oregon R. R. & Navigation Co.*, 98 Fed. Rep. 16. All that was decided in *Wisconsin, Minnesota & Pacific R. R. v. Jacobson* 179 U. S. 287, was that by statute two railroad companies might be required to make track connections. So much of the statute as undertook to regulate rates was not passed upon. See *Minneapolis & St. Louis R. R. v. Minnesota*, 186 U. S. 257, 263. There is no act of Congress that attempts to give courts the power to require contracts to be made in a case like this.

What we have said applies, in our opinion, to the Constitution of Kentucky with little additional argument. The requirement to deliver, transfer and transport freight to any point where there is a physical connection between the tracks of the railroad companies, must be taken to refer to cases where the freight is destined to some further point by transportation over a connecting line. It cannot be intended to sanction the snatching of the freight from the transporting company at the moment and for the purpose of delivery. It seems to us that this would be so unreasonable an interpretation of the section that we do not find it necessary to consider whether under any interpretation it can be sustained. In view of the course taken by the argument we may add that we do not find a requirement that the railroad company shall deliver its own cars to another road. The earlier part of section 213 provides that all railroads "shall receive, transfer, deliver and switch empty or loaded cars, and shall move, transport, receive, load or unload all the freight in carloads or less quantities, coming to or going from any railroad, . . . with equal promptness and dispatch, and without any discrimination. . . ." Promptness and the absence of discrimination are the point, and that shows that the words "coming to or going from any railroad," qualify the words "empty or loaded cars" as well as "freight," and therefore that the cars referred

to are cars from other roads. The same thing is shown by the word "receive," which is the starting point of all that relates to cars. See *Louisville & Nashville R. R. v. Commonwealth*, 108 Kentucky, 628, 633. The other sections of the Constitution need no special remark.

We have discussed the case as if the two stock yards were side by side. They were not, but they both were points of delivery for cattle having Louisville as their general destination. They both were Louisville stations in effect. It may be that a case could be imagined in which carriage to another station in the same city by another road fairly might be regarded as *bona fide* further transportation over a connecting road and within the requirements of the Kentucky Constitution. However that may be, we are of opinion that the court below was entirely right, so far as appears, in treating this as an ordinary case of stations at substantially the same point of delivery, and, therefore, as one to be dealt with as if they were side by side. As the defendant would not be bound to deliver at the Central Stock Yards if they were by the side of its track, its obligation is no greater because of the intervention of a short piece of the track of another railroad. As we have said, the delivery would have to be made either by unloading or by the surrender of the defendants' cars.

Decree affirmed.

MR. JUSTICE MCKENNA concurs in the result.

KANSAS CITY SOUTHERN RAILWAY COMPANY v.
C. H. ALBERS COMMISSION CO.

223 U. S. 573 (1912).

The facts are stated in the opinion.

Mr. Cyrus Crane, with whom *Mr. Samuel W. Moore* was on the brief, for plaintiff in error.

Mr. John M. Wayde and *Mr. Philip Pitt Campbell* for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a proceeding in garnishment under the laws of the State of Kansas. The C. H. Albers Commission Company had

recovered a judgment in the District Court of Crawford County, in that State, against Robert L. Forrester and Joseph M. Forrester, doing business as Forrester Brothers, in the sum of \$10,333.72, with interest, and had brought the Kansas City Southern Railway Company into the case, as a garnishee, upon a general allegation that it was indebted to Forrester Brothers. The railway company, which will be spoken of as the garnishee, appeared and denied that allegation. Under the practice in that State the issue so framed was, without other pleadings, brought on for trial as a civil action. The trial was begun before the court and a jury, but later the jury was discharged, with the consent of the parties, and the trial proceeded before the court alone. The case made by the evidence was this:

The garnishee was operating a railroad extending from Kansas City, Missouri, to Texarkana, Texas. Another railroad, which will be spoken of as the northern line, connected with it at Kansas City and extended northward to Omaha, Nebraska. Forrester Brothers were buyers and sellers of grain, with offices at St. Louis, Missouri. In the late summer or early fall of 1901 the two roads, at the solicitation of Forrester Brothers, entered into an oral agreement with the latter whereby they were granted a special rate on corn and oats to be shipped in carload lots from Omaha via Kansas City to Texarkana. The evidence was conflicting as to whether the rate agreed upon for the through haul was $12\frac{1}{2}$ or $16\frac{1}{2}$ cents per hundred pounds, but it was one or the other, and the garnishee was to charge and receive 8 cents for the haul over its road and the remainder was to go to the northern line. The evidence was also conflicting as to whether the agreement was to terminate on the thirty-first of October, or was to continue until all the shipments then contemplated by Forrester Brothers were completed. After the agreement was made, and in reliance thereon, Forrester Brothers made large purchases of corn and oats at Omaha for shipment to and sale at Texarkana, as they had contemplated doing when soliciting the special rate. The agreement was observed by the garnishee until and including the thirty-first of October, and during that time the shipments were carried on through bills of lading. Thereafter the garnishee disregarded the agreement, required that the shipments be rebilled at Kansas City, and collected a 10-cent rate for the haul over its road until November 10, and thereafter a 14-cent rate. The payment of the larger rates was made by an agent of Forrester Brothers at Kansas City, who did not know of the agreement.

By exacting the larger rates the garnishee received \$10,527.55 more than it would have received under the 8-cent rate. No schedule embodying the 12½ or 16½-cent rate, whichever it was, for the through haul, or the 8-cent rate for the haul over the garnishee's road, was filed with the Interstate Commerce Commission; and neither was any memorandum or statement of the oral agreement so filed. Apart from the agreement there was no joint through rate applicable to these shipments.

When the agreement was made there was in force on the garnishee's road a "proportional rate" of 10 cents per hundred pounds on corn and oats moving from Kansas City to Texarkana. This rate was not applicable to shipments originating at Kansas City, but only to such as originated elsewhere on connecting lines. Nor was it invariably confined to the movement from Kansas City to Texarkana, for it included also the haul, when there was such, to Kansas City from certain common points, such as St. Joseph, Atchison and Leavenworth, which usually enjoyed the Kansas City rates and were not reached by the garnishee's road, but by other roads. Thus, shipments originating on lines connecting at the common points with the roads leading to Kansas City took this rate from the common points to Texarkana. As applied to such shipments the rate was joint as well as proportional, and as applied to others it was a proportional rate of the garnishee alone. It was embodied in a schedule duly filed with the Interstate Commerce Commission, and remained in force until November 10, when it was superseded by a like rate of 14 cents, shown in an amendatory schedule so filed. These schedules bore a heading indicating that they were adopted by the garnishee "in connection with" other designated railroads, they being the roads over which the haul, when there was such, from the common points to the garnishee's road would be made. The northern line was not one of them, nor was Omaha one of the common points. There was a like provision for the haul, when there was such, from Texarkana to common points therewith, and also a designation of the railroads over which that haul would be made; but as that feature of the schedules is immaterial here, it may be eliminated from consideration.

As explaining a proportional rate and indicating the correct application of the one just named, F. M. King, an experienced station agent of the garnishee, testified: "Q. I will ask if you know whether or not the words 'proportional rates' have a well-defined and understood meaning in railroad business and on the

Kansas City Southern. A. They have; yes, sir. Q. Now, just tell briefly what those terms mean, those words 'proportional rates,' if you know. A. A proportional rate is a rate put in to cover business . . . coming to our lines from other points, applying to commodities where we have no through rates. It is put in in order to protect a shipper on a long haul. For instance, a shipment coming from . . . points out in Kansas, where there is no through rate published, . . . we accept it from the connecting line and bill it out then on a proportional rate, which is less than the local tariff rate. Q. Now, you spoke there of a local tariff rate; if those words have a well-defined meaning, I wish you would state what those are. A. A local rate is a rate applying locally from one station to another on the same road. Q. In that term 'local rate' as distinguished from 'proportional rate,' how about the origin of the shipment? A. That is where it originates and terminates on the same line." And E. E. Smythe, the general freight agent of the garnishee, under whose direction the schedules embracing this proportional rate were prepared and filed, testified: "Q. Mr. Smythe, what is meant in railroading by 'common points'? A. Common points are points which take the same rate. . . . Q. Common points are comparatively close together, taking the same rates? A. Yes, sir. Q. How far north is Omaha from Kansas City? A. 220 or 226 miles. . . . Q. How far north from Kansas City is Atchison and Leavenworth? A. Between 30 and 40 miles. Q. And St. Joe about 60 miles north of Kansas City? A. Yes, sir, 60. Q. Is Omaha a common point with Leavenworth, Atchison, St. Joe and Kansas City? A. No, sir. . . . Q. Now, Mr. Smythe, I will ask you to state what is known in railroading as 'proportional rates,' what does that expression mean, if it has any fixed or definite meaning? A. Proportional rates are rates established in a great many centers — grain centers, if you please — on grain coming from any territory which may be shipped there for reshipment. . . . Q. I will ask you if the words 'proportional rates' have a fixed and definite meaning among railroad men, especially among traffic men? A. Yes, sir. . . . Q. Can you give us an illustration so we will understand it more definitely? Give your own illustration of shipments coming into Kansas City and going out again. A. We will take Wichita, Kansas. Some Kansas City firm will buy hay and grain there from a Wichita dealer, or some point in that territory, and ship that hay to Kansas City to John Jones Commission Co. Mr. Jones pays the freight on that car, and in

the meantime . . . he may have sold that car of hay or grain to go to New Orleans, . . . and he accordingly comes to you, or presents to the general agent the expense bill covering the freight in, and when that is checked to see that the correct rate is applied it goes out on a proportional rate from Kansas City or any other point where the proportional rate applies, at the proportional rate named in the tariff. . . . Q. Explain in your own way. A. You want me to explain what that tariff [the proportional one now under consideration] means? What it would apply on? Q. Yes, sir, just explain the meaning of this expression 'in connection with the Chicago Great Western' and the other roads. A. That tariff would apply on grain coming into Kansas City on any railroad in America [and bound] to Texarkana. . . . Q. You say it would apply on grain coming into Kansas City from any point in the world? Yes, sir, any place in America." This testimony, bearing upon the meaning of the proportional rate schedules, was not in any way contradicted.

It was not shown whether those schedules were sanctioned by the other railroads over which the haul, when there was such, from the common points to the garnishee's road was to be made; and while it was shown that those schedules were regularly printed and that copies thereof were sent to the freight offices of the garnishee at Kansas City and other points and were there kept open to public inspection, it was not shown that copies were posted in public and conspicuous places in those offices.

Respecting the existence of an applicable local rate on the northern line from Omaha to Kansas City, the witness Smythe testified: "Q. I will ask you to state if you know what the rate was in 1901 on grain between Omaha and Kansas City? A. Yes, sir. Q. I will ask you to state what it was. A. The rate was 9 cents. Q. Is that what you call a legal rate? A. It was the legal rate; yes, sir. Q. That is, between Omaha and Kansas City? A. Yes, sir. Q. On what roads was that in effect? A. In effect over the Burlington, Missouri Pacific and all lines reaching Omaha running into Kansas City." This testimony was offered and admitted without objection, and its effect was in no way impaired or qualified, save as the same witness, as also others, testified to the existence of a rate of 6½ cents, called the "Missouri arbitrary," on grain carried from Omaha to Kansas City when destined to points beyond. If this latter was an individual rate of the northern line, and not a conventional division of some joint through rate, as to which the testimony

was somewhat uncertain, it was applicable to the shipments in question; otherwise the 9-cent rate was applicable. In either event there was a lawful local rate covering the haul over the northern line.

At the trial the plaintiff took the position, not that the proportional rate was unreasonable, preferential, discriminatory or otherwise objectionable under the Interstate Commerce Act, but that the special agreement was valid and the garnishee consequently was under a common law liability to Forrester Brothers for all that it had collected in excess of the stipulated 8-cent rate for the haul over its road. And the garnishee's position, insisted upon throughout the trial, is reflected by the following declarations of law which it tendered and the court rejected:

"Where an interstate shipment, of merchandise passes from the point of origin to the point of destination over the lines of two separate carriers, and such carriers have not, by agreement, established a joint rate over their said lines and filed and published the same in the manner required by the Interstate Commerce Act, then the only lawful charge for transportation to be applied to such shipment is the published tariff rate of the first carrier from the point of origin of the shipment to the point of connection with the second carrier, plus the published tariff charge of the second carrier from the point of connection with the first carrier to the point of destination.

"On interstate shipments of merchandise the only lawful rates applicable thereto are such rates as have been filed and published in the manner required by the Interstate Commerce Act."

And, applying those declarations to the evidence, the garnishee insisted that during the time of the shipments in question lawfully established local rates, applicable thereto, were in force upon the two roads, and that those rates were not superseded or displaced by the special agreement with the shipper; that the rates agreed upon, that is, the joint through rate and the 8-cent rate, never became legally operative, because never embraced in any schedule filed with the Interstate Commerce Commission; and, finally, that the charges exacted for the haul over its road conformed to the lawfully established rate, and were the only charges which lawfully could have been accepted.

The trial court sustained the plaintiff's position, made a general finding in its favor, and entered judgment thereon against the garnishee. The Supreme Court of the State affirmed the finding

and judgment (79 Kansas, 59), and this writ of error was then allowed.¹

* * * * *

Coming then to the questions arising upon the case made by the evidence, we have seen that when the agreement for the special rate was made, and during the time of the shipments in question, there was in force on the garnishee's road a lawful proportional rate, at first of 10 and later of 14 cents, applicable to these shipments, unless it was objectionable in some of the following particulars:

(a) Although it was shown that the schedules embodying this rate were regularly printed, duly filed with the Interstate Commerce Commission, and kept open to public inspection at the freight offices of the garnishee at Kansas City and other points, it was not shown that copies were posted in public and conspicuous places in those offices as required by § 6 of the Interstate Commerce Act. Posting, however, was not essential to make rates legally operative, and was required only as a means of affording special facilities to the public for ascertaining the rates actually in force. *Texas and Pacific Railway Co. v. Cisco Oil Mill*, 204 U. S. 449.

(b) It was not shown that these schedules were sanctioned by the other railroads designated therein, they being the roads over which the haul to the garnishee's road from the common points was to be made when the shipments were received from connecting lines at those points. Such a showing, however, was not necessary here. The other roads had no interest in the rate as applied to shipments received by the garnishee from the northern line at Kansas City, as were the shipments in question. As applied to them the rate was not joint, but an individual rate of the garnishee. The sanction of the other roads was essential only to its application to the haul from the common points, when there was such.

(c) As before stated, the heading of these schedules indicated that they were adopted by the garnishee "in connection with" other designated railroads, they being the ones just mentioned as interested in the rate when applied to shipments received from connecting lines at the common points. This, it is contended, meant that the rate was applicable only to shipments received by the garnishee from those roads. But an examination

¹ The court here considered and overruled objections to its jurisdiction.—Ed.

of the schedules satisfies us that they had no such meaning. The heading merely reflected the fact that the rate, in some of its applications, was to be a joint one as between the garnishee and the designated roads. The schedules themselves did not restrict the rate to shipments received from those roads, but, on the contrary, indicated that it was applicable to shipments received by the garnishee at Kansas City from any connecting line. This view of it was fortified, unnecessarily, as we think, by the uncontradicted testimony of expert witnesses, who declared that the rate was applicable to shipments originating on any connecting line, whether received by the garnishee at Kansas City or by one of the designated roads at a common point.

The uncontradicted testimony of witnesses likely to be informed on the subject disclosed the existence of an applicable lawful rate on the northern line from Omaha to Kansas City. True, this testimony was not the best evidence, but, being offered and admitted without objection, it was evidence which could not be disregarded. *Diaz v. United States*, 222 U. S. 574; *Schlemmer v. Buffalo, Rochester & Pittsburg Railway Co.*, 205 U. S. 1, 9; *United States v. McCoy*, 193 U. S. 593, 598. And while it may have been left somewhat uncertain as to which of two such rates, one of 6½ and the other of 9 cents, was the applicable one, it was disclosed with certainty that it was one or the other.

Such being the state of the evidence, the necessary conclusion, as matter of law, is that an applicable and lawfully established local rate was in force on each road. And as it was conceded that there was no established joint through rate, it likewise is a necessary conclusion that the shipments, even if moving on through bills of lading, should have taken these local rates, unless the latter were superseded or displaced by the special agreement.

We are thus brought to the question of the validity of that agreement. Not only did it contemplate a departure from the established local rates for the benefit of a single shipper, but no schedule embracing the rates agreed upon was filed with the Interstate Commerce Commission. Section 6 of the Interstate Commerce Act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That

section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and likewise prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences and the like. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates were placed on the same level. Both were required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act. The true effect of the statute in this regard — we speak of the statute as it existed in 1901 — is clearly stated in the opinion of the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, Burlington & Quincy Railway Co. v. United States*, 157 Fed. Rep. 830, 833, as follows:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end

is taken they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic."

We conclude, as matter of law, that the special agreement was void, that the established local rates were unaffected by it, that the rate collected by the garnishee was the applicable legal rate, and that the finding and judgment should have been in favor of, and not against, the garnishee. 311

To avoid any misapprehension in respect to the character of the liability sought to be enforced in this case, we deem it well to repeat that there was no claim of any right to reparation or damages under the Interstate Commerce Act, and no claim that the rate collected was unreasonable, preferential, discriminatory or otherwise violative of that act, but only an attempt to enforce a supposed liability for a breach of the special agreement. See *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S.

391. ILL. Central v. Henderson Elevator Co. 222 U. S. 391. Action by the Elevator Co to recover for a loss due to wrong quotation as to the frgt rate in interest comm. made by RR's agt. The published ratetariff was on file with the ICC wh fixed the rate @ 13¹/₂ but 10 was quoted. Ct instructed that if the loss was caused by the failure to post the rates indf's depot df was liable. J for plf Error Held: that the failure to post does not keep the rates from being legally operative and binding as the files tariff as to which the P was presumed to have knowledge.

THE facts are state in the opinion.

Mr. Edmund F. Trabue, with whom *Mr. Blewett Lee* was on the brief, for plaintiff in error.

Mr. James W. Clay, *Mr. J. F. Clay* and *Mr. A. Y. Clay* for defendant in error, submitted:

Memorandum opinion, by direction of the court, by MR. CHIEF JUSTICE WHITE.

The Henderson Elevator Company, defendant in error, as plaintiff below brought this action to recover damages from the Railroad Company, the plaintiff in error, because of a loss alleged to have been sustained by an erroneous quotation by the agent of

the Railroad Company of the freight rate on corn shipped in interstate commerce from the station of the Railroad Company at Henderson, Kentucky. A rate of 10 cents per hundred pounds was quoted by the agent when in fact the rate as fixed by the published tariff on file with the Interstate Commerce Commission and effective at the time was $13\frac{1}{2}$ cents per hundred pounds. On the trial before a jury the court instructed that if the loss sustained by the plaintiff "was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Kentucky, its freight tariff rate in question and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question, of which plaintiff complains, . . ." there should be a verdict for the plaintiff. A verdict having been rendered for the plaintiff in accordance with this instruction and the judgment entered thereon having been subsequently affirmed by the Court of Appeals of Kentucky (138 Kentucky, 220), this writ of error was sued out.

It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this court interpreting and applying the Act to Regulate Commerce. *New York Cent. R. R. v. United States* (No. 2), 212 U. S. 500, 504; *Texas & Pacific R. R. Co. v. Mugg*, 202 U. S. 242; *Gulf Railroad Co. v. Hefley*, 158 U. S. 98. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. *Kansas City So. Ry. Co. v. Albers Comm. Co.*, 223 U. S. 573, 594 (a).

*Reversed.*¹

¹ A letter written by a carrier and placed on file by the Interstate Commerce Commission stating a demurrage charge is binding as the filed tariff, *Berwind-White Coal Company v. Chicago and Erie R. Co.*, 235 U. S. — (decided December 14, 1914.) — Ed.

CHICAGO & ALTON RAILROAD COMPANY v. KIRBY.

225 U. S. 155 (1912).

The facts are stated in the opinion.

Mr. Garrard B. Winston and Mr. William Patton, with whom *Mr. Silas H. Strawn* was on the brief, for plaintiff in error.

Mr. Albert Salzenstein, with whom *Mr. James M. Graham* was on the brief, for defendant in error.

MR. JUSTICE LURTON delivered the opinion of the court.

Action in assumpsit to recover damages for the breach of a

293. Chicago and Alton v. Kirby.

Assumpsit for damages for breach of a sp contr where by the R.R. agreed to so carry P's horses as to deliver them at Joliet in time to connect with a fast special P was charged the regular rate wh was not based on fast service. Question wh such sp contr was valid Held: Advantage affecting value of service to shipper and cost to carrier shd be published in tariff Breach of contr giving such contr will not give cause of action where not any such publication, since contr violates Elkins Act and is illegal in giving undue advantage.

in the month, did, on January 24, 1906, contract and agree to carry a car, rented by defendant in error, loaded with horses, for the consideration of \$170.60, over its own rails from Springfield to Joliet, Illinois, and there deliver so that it would be carried by a fast stock train known as the "Horse Special," over the M. C. Railroad, through to New York. Said Horse Special was run but three times each week, and was due to leave Joliet the following morning. It is then alleged that the defendant in error, as directed by the railroad company, delivered and loaded his horses on the afternoon of the twenty-fourth; but that the company did not promptly carry and deliver the same to the said fast stock train on the morning of the twenty-fifth, as it had guaranteed to do, having failed to make connection with

that train; and, that, as a consequence, the car was forwarded by a later and much slower train, and the horses were delivered in New York forty-eight hours after they would have arrived had they been carried by the Horse Special, as the plaintiff in error undertook. As a result of this prolonged transportation, the horses did not reach New York in time to be put in proper condition for the horse sale, whereby the defendant in error sustained damages, aggregating several thousand dollars.

The plaintiff in error pleaded the general issue and under this presented certain defenses which we shall pass by, as not constituting questions of law or fact open to review upon a writ of error to a state court.

The single Federal question arises upon the validity of the contract to so carry these horses as to deliver them at Joliet to be carried through to New York by the Horse Special, leaving Joliet on the twenty-fifth of January.

That the railroad company had established and published through joint rates and charges upon carload shipments of live stock to New York is not disputed. The rates furnished the defendant in error were the regularly published rates. Those rates and schedules did not provide for an expedited service, nor for transportation by any particular train. Neither was Kirby required to pay any other or higher rate for the promised special service, by which his car was to be carried so as to be attached to the fast stock special and carried by it to New York.

By the third section of the original act of February 4, 1887, 24 Stat. 379, it is made unlawful to give any undue or unreasonable "preference or advantage," to any particular person, or to subject any particular person to "any undue or unreasonable prejudice or disadvantage in any respect whatever." By the sixth section of the same act it is required that the carriers subject to the act shall print and keep for public inspection schedules showing the rates, charges and classifications, "and any rules or regulations, which in any wise change or affect or determine any part or the aggregate of such aforesaid rates and fares and charges." The same section also provides as follows: "And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation, for the transportation of passengers or property, or for any services in connection there-

with, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

By the act of February 19, 1903, known as the Elkins Act, amending the act of 1887, 32 Stat. 847, c. 708, it is made "unlawful for any person, persons, or corporation to offer, grant, or give or to solicit, accept or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced."

The implied agreement of a common carrier is to carry safely and deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time, or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the common-law carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.

The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

In *Armour Packing Company v. United States*, 209 U. S. 57, 72,

Mr. Justice Day, dealing with a violation of the act by carrying out a contract for a rate, after the rate had been changed by publication of a higher rate, said:

"The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published."

The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs. The general scope and purpose of the act is so clearly pointed out in *New York, N. H. & H. Railroad Company v. Interstate Commerce Com.*, 200 U. S. 361, 391, and in *Texas & P. Railroad Company v. Abilene Cotton Oil Co.*, 204 U. S. 426, as to need no reiteration.

That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to have contracted for an advantage not open to others. *Texas & P. Railway Co. v. Mugg*, 202 U. S. 242.

The claim that the defendant in error may recover upon the carrier contract, stripped of the illegality, under *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, is not presented by this record. The declaration counted only upon the breach of a special contract which was illegal. There was no count based upon the carrier's liability for negligence in not promptly shipping and delivering. The judgment was rested upon the damages resulting from the breach of the special contract, and not at all upon the liability of the carrier otherwise.

For the error in not holding the special contract invalid under

the Interstate Commerce Act, the judgment must be reversed and the case remanded for such further proceedings as are not inconsistent with this opinion.

FOURCHE RIVER LUMBER COMPANY v. BRYANT LUMBER COMPANY.

230 U. S. 316 (1913).

The facts are stated in the opinion.

Mr. Luther M. Walter and *Mr. W. E. Hemingway*, with whom *Mr. U. M. Rose*, *Mr. G. B. Rose*, *Mr. D. H. Cantrell*, *Mr. J. F. Loughborough* and *Mr. M. W. Borders* were on the brief, for plaintiff in error.

Mr. Charles C. Reid, with whom *Mr. T. M. Mehaffy* was on the brief, for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Bryant Lumber Co. had its mill and saw mill plant at or near Bigelow, Arkansas, on the Rock Island Railroad. The Fourche Lumber Co.'s plant was located near by on a spur track laid about a mile from the main line of the Rock Island R. R. Both of these lumber companies owned timber in a rough, hilly country which could only be reached by a railroad, belonging to the Bryant Co. The Fourche Lumber Co. had already built a road on this land, claiming that it had been granted a right-of-way by the Bryant Co., and had applied for a railroad charter. This application was resisted by the Bryant Co., which denied that it had made any grant of a right-of-way. Finally, and in order to avoid threatened litigation the parties, in August, 1905, entered into an agreement in which, among many other matters, it was provided that a charter should be granted to the Fourche River Valley & Indian Territory R. R., to be organized by the Fourche Company; that the Bryant Co. would grant this Fourche Railroad a right-of-way and that the Fourche Co. was to arrange for the building of switches to enable the Bryant Co. to reach its timber, which was to be transported at 37½ cents per 100, and that "the price for hauling future acquired lumber of the Bryant Co. over the Fourche R. V. & I. T. R. R. should be fixed by a

board of arbitrators, who should have authority to settle any differences that might arise between the parties as to the details of carrying out the contract," and "so that the Bryant Co. might be secured against any discrimination in favor of the Fourche Co. in the transaction of its business, and the Fourche Co. shall be required to carry timber and other freight equally without discrimination for or against the Bryant Co."

The Fourche Co. agreed that it would cause the contract to be ratified by the Fourche River Valley & Indian Territory R. R. Co. Thereafter the contract was carried out; the Fourche R. R. was incorporated; the Bryant Co. made to it a conveyance of the right of way as stipulated; the railroad was constructed and hauled freight in intrastate and interstate commerce.

There was evidence that all of the stock of the Railroad, except one or two qualifying shares, were held by the persons who owned the Fourche Lumber Co., but the two corporations kept separate books, and when the Railroad made dividends they were paid to its stockholders of record.

In August, 1907, differences arose between the parties and under the provisions of the contract the Bryant Co. demanded an arbitration of several matters in issue — among others submitting to the Board the following proposition:

"Fourth. That the Fourche River Lumber Company through the Fourche River Valley & Indian Territory Railroad Company shall secure to the Bryant Lumber Company from the Fourche River Valley & Indian Territory Railroad Company, the same freight concessions as are now enjoyed by the Fourche River Lumber Company, through its interest and the interest of its owners in the Fourche River Valley & Indian Territory Railroad Company."

The arbitrators found in favor of the Bryant Company and the terms of the award not having been complied with, the Bryant Company brought suit against the Fourche Lumber Company.

It appears that under the blanket rate, then of force, the same rate of freight was charged from any point in Arkansas to St. Louis, to Memphis or to Oklahoma points. Out of this through rate the Rock Island allowed 2, 3 and 3½ cents to the Fourche R. R. on all lumber originating on such road and shipped over the Rock Island to St. Louis, Memphis or Oklahoma. This division of through rate between the two roads on interstate shipments was noted on the tariffs filed with the Interstate Commerce Commission.

On the trial, the president of the Bryant Co. testified that it had shipped 13,251,759 pounds of lumber in interstate shipments, and on it the Bryant Co. claimed 2 cents per 100.

Being asked what was the basis of the claim he said: "They are getting it. Q. Who is getting it? A. The Fourche River Vy. & Indian River R. R., which are the same people as the Fourche River Lumber Co. Q. They are two separate and distinct corporations? A. Yes." In reference to the claim for failing to lay the tracks and switches as agreed he was asked: "Did the Fourche R. R. furnish you with a profile? A. I don't know that it was the Railroad Co., it was the Lumber company I think. Q. Who did you get the profile from? — The Lumber Co. or the Railroad Co.? A. I don't know. To me they are all the same. Q. I understand that; it is to your advantage to have them all the same, but as a matter of fact from which institution did you get the profile? A. I could look at the papers and see which one wrote the letter, but it is the same people all the time."

The defendant excepted to the refusal of the court to instruct the jury that "a payment to the plaintiff of the differentials provided in the award of the arbitrators would be the granting to the Bryant Co. of a rebate forbidden by law, enabling the Bryant Co. to transport its goods at less than the tariff rate and you will find for the defendant on that issue." Instead of giving the charge requested the court instructed the jury that "under the contract, and findings of the arbitrators, the Fourche Lumber Co. was required to pay the Bryant Co. the same differentials that the Fourche R. R. received on interstate shipments of the Fourche Lumber Co. If you find from the testimony that the Fourche R. R. has received certain differentials from the Rock Island on interstate shipments and that the Fourche Lumber Co. has not paid to the Bryant Lumber Co. the same differentials on lumber that the Bryant Co. has shipped to the same territory, then you are instructed that the defendant (Fourche Co.) is indebted to the Bryant Co. the amount of any such differentials which it has not paid."

A judgment on the verdict rendered in accordance with this charge having been affirmed, the Fourche Lumber Company brought the case here, insisting that the charge and verdict were in violation of the Interstate Commerce Act, and, in effect, amounted to the giving of a rebate to the Bryant Lumber Company. The latter replies that the suit is against the Fourche

Lumber Co. and that there is no law preventing one company from paying the whole or any part of the freight due by another. That may be true but not where that other party is sued as being in effect a common carrier engaged in interstate commerce. The arbitration was demanded and the award made on the theory that, inasmuch as the contract provided that there should be no discrimination, the Bryant Company was entitled to receive from the Fourche Lumber Company "the same freight concessions as are now enjoyed by the Fourche Lumber Company through its interest and the interest of its owners in the Fourche Railroad." This suit is based upon the assumption that the two companies are identical in fact, though different in name.

Thus treating it, the case is as though the Bryant Lumber Company had sued the Fourche Lumber Company, doing business as an interstate carrier, for so much of the through rate as had been paid to it on the division by the Rock Island for hauling the Bryant Company's shipments of lumber. To state the proposition is to manifest its illegality, and to show that thereby the Bryant Company would get a reduction on the through rate on all of its lumber originating on the Fourche line.

The Fourche Railroad was not only incorporated as a common carrier but is treated as such by the Interstate Commerce Commission, and, under the filed tariffs of the Rock Island road, receives a part of the through rate on all lumber originating upon the line and shipped in interstate commerce. The status of this road is discussed in *Tap Line Cases*, 23 I. C. C. 277, and its right to a division of the freight recognized notwithstanding the fact that the stockholders are the same as those who own the shares of the Fourche Lumber Company. But it receives this part of the through rate, not as a concession, but for services actually rendered by it as a common carrier in hauling freight for part of the distance between the point of origin and the point of destination. In any other view it would have been unlawful for the Rock Island to pay, and, if so, no agreement to divide such unlawful receipts would be enforced by the courts. On the other hand, if the Fourche Railroad was lawfully paid for such services in hauling the lumber it would be illegal, directly or through a subsidiary, to give to the shipper a part of such joint rate under any pretext whatever. Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way, even though the amount of

such rebate was much less than the value of the land thus acquired. Cf. *Louisville & Nashville Ry. Co. v. Mottley*, 219 U. S. 467; *United States v. Lehigh Valley Railroad*, 220 U. S. 257; *United States v. Union Stock Yards*, 226 U. S. 287, 308.

The Commerce Act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the Railroad itself or from a company that is proved to be the same as the Railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers.

The suit in the present case proceeds on the theory that the Fourche Lumber Company and the Fourche Railroad are the same and that therefore the division of the through rate allowed to the railroad was in fact received and enjoyed by the Lumber Company. And yet, notwithstanding that fact, it is claimed that if the Fourche Lumber Company should, under the contract, pay a part of that freight to the Bryant Company it would do so as a saw-mill and not as a carrier. The law will not permit such a chameleon-like change. The Fourche Lumber Company and the Fourche Railroad are either the same or different. If they are the same it cannot refund a part of the rate to the Bryant Company. If they are different the Fourche Lumber Company was not bound by the terms of the contract to make the payment now demanded. The court below found that they were the same and not different, and it results that its judgment must be

Reversed.

CUDAHY PACKING CO. v. GRAND TRUNK WESTERN
RY. CO.

UNITED STATES CIRCUIT COURT OF APPEALS, Seventh Circuit.

215 Fed. Rep. 93 (1914).

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; *George A. Carpenter*, Judge.

Action by the Grand Trunk Western Railway Company against the Cudahy Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles B. Morrison, of Chicago, Ill., for plaintiff in error.

Geo. W. Kretzinger, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Defendant in error, plaintiff below, recovered judgment against defendant for \$3,637.75 on account of icing charges in transporting dressed meats for defendant.

A jury trial was duly waived, and the cause was submitted on an agreed statement of facts that showed: That plaintiff was a railroad corporation engaged in interstate commerce. That defendant was an interstate shipper of dressed meats. That plaintiff had duly published and filed its schedule of carriage charges for dressed meats, exclusive of icing charges. That defendant paid plaintiff the carriage charges. That plaintiff had duly published and filed a tariff sheet in which the following provision was made for icing charges over and above carriage charges: "Shippers desiring refrigerator service for freight in car loads must furnish at their own cost the necessary quantity of ice and salt, or this company, when requested, will obtain and furnish the same, charging therefor the actual cost including labor, but not less than \$2.50 per ton of 2000 lbs., fractions of tons to be charged for pro rata." That defendant requested plaintiff to ice defendant's car load shipments. That plaintiff did so and charged therefor at the rate of \$2.50 per ton of 2,000 pounds. That plaintiff procured some of the ice from Swift & Co., a competitor of defendant in the dressed meats trade, at a cost of \$2.50 per ton of 2,000 pounds, and that defendant failed and refused to pay plaintiff for any of these icing charges.

In view of the Commerce Act's definition that transportation shall include all services in connection with refrigeration or icing of property transported, and of plaintiff's action under that definition in furnishing ice as a service in transportation, it is needless to consider plaintiff's contention that Congress lacked constitutional power to compel carriers to furnish ice, and that plaintiff could therefore recover the value of its icing services for defendant on an express or an implied contract, without making, publishing, and filing fixed and definite rates therefor. By holding itself out voluntarily as ready to ice car load shipments, plaintiff brought itself within the supervisory and regulatory provisions of the act with respect to reasonableness, certainty, and publicity of rates.

Under the Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) compensation for service in transportation cannot be a matter of bargaining between carrier and shipper, and no payment can lawfully be demanded or received except in accordance with a fixed and definite schedule of charges duly published and filed.

Is plaintiff's tariff provision, that the charge for icing shall be "the actual cost, but not less than \$2.50 per short ton," void for uncertainty? If "cost" were published as the charge for a service in transportation, the tariff would in that respect undoubtedly be void, for cost is necessarily variant and is undeterminable with exactness until after the event, while the act contemplates that the shipper shall be informed of a fixed and definite rate in advance of his shipment. If the icing charge were stated to be "\$2.50 per short ton," we conceive that no complaint would be made on the ground of uncertainty. If plaintiff had published that "the minimum rate for icing is \$2.50 per short ton," without stating any higher rate or giving any fixed and definite basis on which a higher rate could be calculated in advance with certainty, it seems to us that the word "minimum" might well be disregarded as superfluous and \$2.50 taken as the fixed rate under all circumstances. *Knudsen-Ferguson Co. v. Mich. Cent. R. Co.*, 148 Fed. 968, 79 C. C. A. 46. Quite evidently plaintiff has woven the idea of cost into its icing tariff. But does that element inhere throughout the structure? If the cost is less than \$2.50 per short ton, the tariff explicitly provides that nevertheless \$2.50 per short ton shall be the rate. In that part of the structure, therefore, the idea of cost as a condition to be taken into account has clearly been excluded. It is only in the part of the tariff which contemplates a charge above \$2.50 per short ton that cost is made an element in the accounting. There is, consequently, we believe, a clean line of demarcation at \$2.50 per short ton. Cost, if below or at that line, plays no part; if above, it is the sole basis given. And inasmuch as cost, for reasons heretofore stated, cannot be accepted as a published rate under the act, part of plaintiff's icing tariff is void for uncertainty. But, while the Commerce Act and all tariffs and doings of carriers should be strictly construed and enforced to accomplish the large purposes of fairness and uniformity, we are of opinion that the general principle in relation to statutes, wills, contracts, etc., that the illegal parts will be excised and the legal preserved unless the bad is so interwoven with the good that extrication is

impossible, should be applied to the facts of this case. Plaintiff had duly declared that icing service was not included in the carriage rate, and had published an icing tariff, part of which was good and part bad. Where to cut seems clear, and what is left is without taint. And what is left is the only part that has been acted on by plaintiff.

Whether the carriage and icing charges separately or combined were reasonable, whether plaintiff could lawfully arrange to procure ice from defendant's competitor, and whether that arrangement brought about an undue preference, are matters beyond this case.

The judgment is affirmed.

DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY *v.* UNITED STATES.

231 U. S. 363 (1913).

THE facts are stated in the opinion.

Mr. W. S. Jenney for plaintiff in error.

Mr. Assistant to the Attorney General Todd for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

The Delaware, Lackawanna & Western Railroad Company was indicted for hauling, over its lines, between Buffalo, New York, and Scranton, Pennsylvania, twenty carloads of hay, belonging to the Company, but not necessary for its use as a common carrier. This transportation was charged to be in violation of the Commodities Clause of the Hepburn Act, June 29, 1906, c. 3591, 34 Stat. 585, which makes it unlawful "for any railroad company to transport in interstate commerce any article . . . it may own . . . or in which it may have any interest . . . except such . . . as may be necessary . . . for its use in the conduct of its business as a common carrier."

On the trial it appeared that the defendant was not only chartered as a Railroad, but had also been authorized to operate coal mines. The hay, referred to in the indictment, had been purchased for the use of animals employed in and about the mines at Scranton — all the coal taken therefrom being sold for use

by the public, except the steam coal which was used as fuel for the Company's locomotives.

The defendant was found guilty and sentenced on each of the twenty counts. It brought the case here, insisting that the Commodities Clause violated the Fifth Amendment; deprived the Company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter granted by the State of Pennsylvania, many years before the adoption of the Hepburn Bill.

1. This contention must be overruled on the authority of *United States v. Delaware &c. Co.*, 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to "all commodities, except lumber."

304. Delaware Lackawanna and Western RR v. U.S.
The RR was indicted and convicted for a violation of the commodities clause in the Hepburn Act in transporting hay owned by it over its road for use in its coal mining business. The RR then brought the case to the Sup Ct contending that the commodities clause violated the 5th Amendm., that the hay was necessary in its business since it obtained its steam coal from its mines and that the RR did not become owner of the hay until it reached the mines. Held that the cl deals with the RR as carriers and fact they also engage in priv busi immat. Mines of RR primarily to sell coal. As to title it really passed to RR at once, subj to resc

and also for its own private purposes. opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The Commodities Clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the Company occupied the dual and inconsistent position of public carrier and private shipper.

It was suggested that the case is not within the statute because, as the Company could buy, in Scranton, hay that had already been transported over its line, no possible harm could come to anyone if it brought the same hay at Buffalo and then hauled it

to Scranton for use at the mine, but not for sale in competition with other dealers in stock food. But the courts are not concerned with the question as to whether, in a particular case, there had been any discrimination against shippers or harm to other dealers. The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented.

2. In this case the hay was purchased for use in operating mines where 75 per cent. of the coal produced was "assorted sizes" intended to be sold for domestic purposes. The remaining 25 per cent. was steam coal — all of which was used as fuel on the Company's locomotives. This steam coal was in the nature of a by-product from a mine operated primarily for the purpose of obtaining coal for sale. Hay purchased for use in such mining cannot be said to have been necessary for the use of the Company in the conduct of its business as a common carrier.

3. Lastly, it was contended that the hay did not belong to the Railroad Company at the time of the transportation and, therefore, the conviction should be set aside since the statute only prohibits the hauling of commodities owned by the carrier.

This contention is based upon the terms of the contract, by which the Vassar Company, of Millington, Michigan, agreed to sell to the Railroad Company 3,000 tons, No. 1, timothy hay, at \$15.40 per ton, f. o. b. Buffalo, payment to be made as follows: Upon the delivery of the hay to the purchaser, at Buffalo, same will be transported by the purchaser to various points on its line of railroad to be determined by the purchaser, at which places the purchaser shall have the right to inspect such hay before acceptance, and if upon such inspection said hay shall prove to be of the kind specified, the purchaser shall accept such hay and pay for the same within 30 days after such acceptance. Each of the twenty carloads of hay mentioned in the indictment was received by the Company at Buffalo. Each was then re-consigned to itself at Scranton. The waybills were marked "Freight free — Co. use." After arrival at Scranton it was inspected, accepted and used.

On these facts the defendant insists that the title did not pass until after acceptance, and many authorities are cited to support the proposition that, in a contract for the sale of personal property not only delivery by the seller, but acceptance by the buyer, is

necessary for the transfer of title. But there are two kinds of acceptance — one of quality and the other of title. They are not necessarily contemporaneous. There may be an acceptance of quality before delivery, as where goods are selected by the purchaser — delivery and transfer of title being postponed until a later time. Or, there may be an acceptance of title without an acceptance of quality; so that in many cases, after the title has passed, the purchaser may recover damages if the goods, upon inspection, prove to be of a quality inferior to that ordered. *Day v. Pool*, 52 N. Y. 416; *Zabriskie v. Central R. R.*, 131 N. Y. 72; *Bagley v. Cleveland Co.*, 21 Fed. Rep. 159 (3), 164; *Miller v. Moore*, 83 Georgia, 684. Again, though there may be such an acceptance as will transfer the title, the purchaser may, under the contract, have the right to rescind, as for a condition subsequent, if the goods do not correspond with the specifications. Such was the case here. When the hay was received by the purchaser at Buffalo there was such an acceptance as to transfer title to the Railroad, which accordingly took possession and exercised control in fixing when and to what point on its line the hay should be shipped. Title *prima facie* passes when delivery is made and if such possession followed by acts of ownership did not transfer the title to the Railroad Company, it left the risk of unknown dangers, at unknown points, for an indefinite time, upon the seller. So hard and unusual an incident is not, under facts like these, necessarily to be implied from the use of the ambiguous phrase, “pay after inspection and acceptance,” and no such construction should be given unless demanded by the explicit terms of the contract. The parties, by their conduct, showed that they did not understand that the hay remained the property of the seller after it had been delivered to the buyer, for the hay after being received was consigned by the Company to itself and went forward from Buffalo to Scranton on waybills containing the entry “Freight free — Company use.” If the hay did, in fact, then belong to the Vassar Company, such a shipment on such a waybill would have been a departure from the published tariff, contrary to the provisions of the Act to Regulate Commerce. No such offense however was committed, for the contract, both by its terms and in the light of the conduct of the parties, meant that the title should pass when delivery was accepted by the defendant at Buffalo, but that the Railroad Company might rescind if, on later inspection, the quality was found to be different from what had been described in the contract of sale. But after

such delivery and before such rescission, the title was in the Railroad Company. *Allen v. Maury*, 66 Alabama, 10; *Burrows v. Whitaker*, 71 N. Y. 291; *Kuppenheimer v. Wertheimer*, 107 Michigan, 77. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the Commodity Clause.

Judgment affirmed.

3. MAINTENANCE OF COMPETITION.

SOUTHERN PACIFIC COMPANY *v.* INTERSTATE
COMMERCE COMMISSION.

SOUTHERN CALIFORNIA RAILWAY COMPANY
v. SAME.

ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY *v.* SAME.

SANTA FE PACIFIC RAILROAD COMPANY
v. SAME.

SOUTHERN PACIFIC COMPANY *v.* SAME.

200 U. S. 536 (1906).

MR. JUSTICE PECKHAM delivered the opinion of the court.¹

* * * * *

Upon the proceeding before the Circuit Court, that court did not pass upon the question decided by the Commission, but held that the routing rule agreed to between the initial carrier and the various eastern companies, and forming a part of the subsequent joint through tariffs which were filed with the Commission, was in itself a contract or combination for the pooling of freights.

The defendants object that the Circuit Court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the court was not confined to those grounds, and if it found the rule was,

¹ The facts and remainder of opinion will be found on page 219, *supra*.—Ed.

in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court.

That court found that the rule was adopted to uphold their published rates, or in other words to maintain the rates on the joint through tariff. Although, under the previous through rate tariff, these rates had been secretly cut by the eastern connect-

308. So. Pacific v. ICC.

By a thru tariff agreement the initial carrier instead of the shipper was given the right to route fgt in order to do away with unlawful rate competition by the granting of rebates by the connecting carriers in violation of the thru rates. The Cir Ct held that this violated the provision vs routing of fgt (sec.5). Judgment declaring the agreement void reversed. Held that the putting of the provision for routing by the initial carrier in the agreement for joint thru rates did not violate sec 5. for as these RR had adopted thru rate tariff they were no longer rate competing roads and had no right to privately reduce their rates to bring about such competition.

agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendants' plan to maintain through rates through the operation of the routing rule necessarily destroyed competition, and the adoption of the routing rule put the shippers in a position where their patronage could not possibly be competed for by the defendants' eastern connections.

Thus the mere fact that the initial carrier was granted by this through tariff agreement the right to route the freight was held to result in the formation of a pool, in violation of the fifth section of the act. There was no other agreement proved in the case.

such delivery and before such rescission, the title was in the Railroad Company. *Allen v. Maury*, 66 Alabama, 10; *Burrows v. Whitaker*, 71 N. Y. 291; *Kuppenheimer v. Wertheimer*, 107 Michigan, 77. As the hay belonged to the defendant and was intended for use in its private business of mining, the transportation over its lines, in interstate commerce, was a violation of the Commodity Clause.

Judgment affirmed.

3. MAINTENANCE OF COMPETITION.

SOUTHERN PACIFIC COMPANY v. INTERSTATE

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 the agreement for joint rates tariff
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¹ The facts and remainder of opinion will be found on page 219,
supra.—Ed.

in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held that the rule to be a violation of one section, the order to desist might be valid, if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the Circuit Court.

That court found that the rule was adopted to uphold their published rates, or in other words to maintain the rates on the joint through tariff. Although, under the previous through rate tariff, these rates had been secretly cut by the eastern connections of the initial carriers, yet when the routing rule was agreed to as part of the through rate tariff these rebates ceased. Hence, as the court said, the purpose of the rule was undoubtedly to maintain the through rate tariff, and that it was effectual. But the court held, as a result, that this routing provision, being part of the through rate tariff, agreed to by the various eastern roads, made a contract among those roads for the pooling of freights on competing railroads within the meaning of section 5 of the Commerce Act. It held that it was not necessary in order to form a pool, in violation of that section, that the contract or agreement should fix the percentages of freight the several railroads were to receive, or that the railroads should know in advance what the percentages should be; that it was sufficient to constitute a pool if the contract or agreement provided for special means or agencies for apportioning freights, which would destroy the rivalry which would otherwise exist between the competing railroads; and an agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendants' plan to maintain through rates through the operation of the routing rule necessarily destroyed competition, and the adoption of the routing rule put the shippers in a position where their patronage could not possibly be competed for by the defendants' eastern connections.

Thus the mere fact that the initial carrier was granted by this through tariff agreement the right to route the freight was held to result in the formation of a pool, in violation of the fifth section of the act. There was no other agreement proved in the case.

It is stated by the Commission that the shipments are forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines. At the same time the Commission finds that initial carriers generally comply with the requests of the shippers to route the freight as desired. The substance of the report of the Commission is, therefore, that there is a certain percentage of the traffic given the connecting carriers when there is no request for routing given by the shippers. It amounts to the giving of fair treatment to the connecting carriers. It is true the Commission calls this a tonnage pool between the connecting carriers, to which the initial carriers give effect by their routing arrangement, and that its object was not so much to prevent rebates, which was but an incident, as to effect the tonnage division. We are of opinion, however, that the evidence is substantially one way, and that is that the arrangement for routing was to break up rebating, and that it has been accomplished. The evidence before the Circuit Court was to the effect that there was no agreement whatever with the eastern connections that any of them should have any particular proportion of the freight, but the eastern roads entered into the routing agreement because they were satisfied that it would be better than the then present practice of rebating, and they thought that they would get a fair share of the business, or, in other words, would be fairly treated by the initial carriers, who gave them to understand that they would be so treated. The tonnage pool was, as the witnesses said, a myth, and it was testified to that there was not one of the eastern companies that knew what percentage of the whole business that company secured. They simply knew that the through rates were maintained under the operation of the routing agreement and that rebating ceased, and they were satisfied with the manner of their treatment by the initial carrier.

The Circuit Court, in order to arrive at its result, necessarily treated the connecting carriers as rival and competing transportation lines for this freight, and assumed that between these lines there would exist, but for the routing agreement, a competition for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates; that as competition was destroyed by this rule, it was idle to say that such result was not intended by the defendant, and so it was held that the carrying out of the routing agreement violated the act.

We think these various roads were really not competing roads

within the meaning of the fifth section of the Commerce Act, when the facts are carefully examined. That act recognizes the right of the carriers to agree upon and provides for the publication of joint through tariff rates between continuous roads, on such terms as the roads may choose to make, provided, of course, the rates are reasonable and no discrimination, or other violation of the act is practiced. The initial carrier did not, on its line, reach the eastern markets, but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates, with all or any one of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provision of the act.

Prior to the adoption of the routing rule these connecting railroads were already acting under a through rate tariff which continued up to the time when the agreement for the routing was adopted. When so acting it was no longer possible to compete with each other as to rates (and it is upon the rebates as to rates that this whole controversy is founded), provided the companies fulfilled their joint rate tariff agreements. The only way the rate competition could exist under the through rate tariff was by violating the law. This, unfortunately, was habitually done, and during that time the competition consisted in a rivalry between these roads, as to which would be the greatest violator of the law by giving the greatest rebates.

In truth, the only way in which these connecting lines could legally become competing railroads for this California fruit trade would be in the absence of all joint tariff rate agreements. The moment they made such agreements, and carried them out, rate competition would cease.

All that would be needed for the total suppression of rate competition among the connecting railroads would be the honest fulfillment of their agreement as to joint through rates. And just here is where they failed and where they violated their agreement and the law by granting rebates, or, in other words, by competing, as to rates, for the freight in violation of the joint rates. In such case we do not see any violation of the pooling section of the act, by putting in the agreement for joint through rates the provision for routing by the initial carrier. It achieved its purpose and stopped rebating, although it thereby also stopped rate

competition which, in the presence of the through rate tariff, was already illegal. The railroads are no longer rate competing roads after the adoption of a through rate tariff by them, and they have no right to privately reduce their rates.

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the fifth section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

We must remember the general purpose of the act which is, as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight and the honest performance of duty, with no improper or unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

We think that the agreement in question, upon its face, does not violate any provision of the Commerce Act, and there is no evidence in the case which shows that in fact there has been any such violation.

The decree of the Circuit Court is reversed and the case remanded with instructions to dismiss the bill.

Reversed, etc.

CHAPTER III

FUNCTIONS OF THE INTERSTATE COMMERCE COMMISSION IN THE ENFORCEMENT OF THE ACT

1. CONSTITUTIONALITY.

INTERSTATE COMMERCE COMMISSION *v.* BRIMSON.

154 U. S. 447 (1894).¹

Acting upon an informal complaint, the Interstate Commerce Commission of its own motion investigated into the alleged unreasonable rates and discriminations in favor of the Illinois

313. *ICC v. Brinson.*

The ICC of its own motion investigated into a case of alleged discriminatory rates. At the hearing witnesses refused to obey the subpoena of the ICC. ICC petitioned the Cir Ct for an order compelling the W's to answer and produce books called for. Petition dismissed, the ct holding sec. 12 unconstitutional. Appeal. Held that Congress did ~~not~~ have power to create the ICC and to give it authority to investigate interstate comm. and power to call wit etc.

General [Olney] and Mr. George F. Edmunds filed a brief for same.

Mr. E. Parmelee Prentice, (with whom were *Mr. J. C. Hutchins* and *Mr. C. S. Holt* on the brief,) for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorized the Circuit Court of the United

¹ The facts have been briefly restated. — Ed.

States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the Circuit Courts of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well to all controversies to which the United States shall be a party, (Art. 3, sec. 2,) and as the Circuit Courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress, 25 Stat. 434, c. 866, the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The Circuit Court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offence punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial

In re Interstate Commerce Commission, 53 Fed. Rep.

July 20.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offence against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the Attorney General of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument. . . .

[The Court then considered the nature of the power to regulate commerce, and the conditions under which it may constitutionally be exerted.]

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one State to another, is a proper regulation of interstate commerce, or that the object that Congress has in view by the act in question may be legitimately accomplished by it under the power to regulate commerce among the several States. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the Commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way, to obtain full and accurate information of all matters involved in the enforcement of the act of Congress. It was clearly competent for Congress, to that end, to invest the Commission with authority to require the attendance and testimony of witnesses,

and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the Interstate Commerce Act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which Congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be, directly and indirectly, imposed upon it by means of unjust and unreasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

4 Wheat. 316, 409. The test of the power of Congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. *Sinking Fund Cases*, 99 U. S. 700, 718.

An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the States under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, other-

wise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling by all lawful methods obedience to such rules.¹ . . .

MR. JUSTICE BREWER dissented; the CHIEF JUSTICE [FULLER] and MR. JUSTICE JACKSON, concurring in the dissent.²

2. POWERS AND DUTIES.

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY

317. ICC v. New Orleans etc RR.

The ICC brought mandamus vs the RR in Cir Ct to compel the RR to obey its order prescribing a schedule of maximum fgt rates. Appeal from decree dismissing bill. Question whether the ICC had the power to make such an order.

Held that Congress had not conferred upon the ICC the power of prescribing rates wither maximum, minimum or absolute.

hearing entered a decree dismissing the bill (70 Fed. Rep. 183), from which decree an appeal was taken to the Court of Appeals, and that court, reciting the order, submits to us the following question: "Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth — all proceedings preceding said order being due and regular, so far as procedure is concerned?"

Mr. Harlan Cleveland for appellant. *Mr. Assistant Attorney General Whitney* filed a brief for same.

Mr. Edward Baxter for appellees.

Mr. George F. Edmunds closed for appellant.

¹ The court then considered at length and concluded that a proceeding to compel testimony was a case or controversy to which the judicial power of the United States extended. — Ed.

² Reported in 155 U. S. 3.

³ The facts have been briefly restated. — Ed.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court. . . .

Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so.

11 The question debated is whether it vested in the commission the power and duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the States of this Union. In England, while control had been given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice had been varying.¹ . . .

It is one thing to inquire whether the rates which have been charged and collected are reasonable — that is a judicial act;

¹ The court here reviewed the legislation of the various States then in force, which may be found in full in the fourth annual report of the Interstate Commerce Commission, appendix E, pp. 243 *et seq.* — *En.*

but an entirely different thing to prescribe rates which shall be charged in the future — that is a legislative act. *Chicago, Milwaukee &c. Railway v. Minnesota*, 134 U. S. 418, 458; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397; *St. Louis & San Francisco Railway v. Gill*, 156 U. S. 649, 663; *Cincinnati, New Orleans &c. Railway v. Interstate Commerce Commission*, 162 U. S. 184, 196; *Texas & Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 197, 216; *Munn v. Illinois*, 94 U. S. 113, 144; *Peik v. Chicago & Northwestern Railway*, 94 U. S. 164, 178; *Express cases*, 117 U. S. 1, 29.

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the interstate commerce act do we find words similar to those in the statutes referred to, giving to the commission power to "increase or reduce any of the rates"; "to establish rates of charges"; "to make and fix reasonable and just rates of freight and passenger tariffs"; "to make a schedule of reasonable maximum rates of charges"; "to fix tables of maximum charges"; to compel the carrier "to adopt such rates, charge or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced? In the first section it is provided that "all charges . . . shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Interstate Commerce Commission. Section 12, as amended March 2, 1889, (25 Stat. 858,) gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that in enforcing and executing the provisions of the act it is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited;

that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges; and as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not in terms given the commission the power to determine what are just and reasonable rates for the future, yet as no other tribunal has been provided, it must have intended that the commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section commanding reasonable rates, and the twelfth empowering the commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the commission the power to prescribe any tariff and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees:

"Article II, sec. 3, of the Constitution of the United States, ordains that the President 'shall take care that the laws be faithfully executed.' The act to regulate commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce." . . .

"The first section simply enacted the common law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts 'to execute and enforce' the common law requirement that 'all charges shall be reasonable and just'; and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers."

But the power of fixing rates under the interstate commerce act is not to be determined by any mere considerations of omission or implication. The act contemplates the fixing of rates and recognizes the authority in which the power exists.¹ . . .

We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial

¹ The court here examined section 6, then in force. — Ed.

*Supporting
analogy*

function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the commission this power of fixing rates, is the clear language of section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second, the filing of the tariff with the commission. The grant to the commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission.

These considerations convince us that under the interstate commerce act the commission has no power to prescribe the tariff of rates which shall control in the future, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the commission no function to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this matter. It is charged with the general duty of inquiring as to the management of the business of railroad com-

panies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the interstate commerce act, shall be secured to all shippers. It must also see that that publicity, which is required by section 6, is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *In re Chicago, St. Paul & Kansas City Railway*, 2 Int. Com. Com. Rep. 231, 261, to both reasonableness and equality of rate as contemplated by the interstate commerce act.

Our conclusion then is that Congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just.

The question certified must be answered in the negative, and it is so ordered.

MR. JUSTICE HARLAN dissented.

NORTHWESTERN WOODENWARE COMPANY v. CHI-
CAGO, MILWAUKEE & PUGET SOUND
RAILWAY COMPANY *ET AL.*

28 I. C. C. 237 (1913).

Walter E. McCornack for complainant.

O. W. Dynes for Chicago, Milwaukee & Puget Sound Railway Company and Chicago, Milwaukee & St. Paul Railway Company.

H. A. Scandrett, R. B. Scott, and Charles Donnelly for Union Pacific Railroad Company; Oregon-Washington Railroad & Navigation Company; Oregon Short Line Railroad Company; Chicago, Burlington & Quincy Railroad Company; Great Northern Railway Company; and Northern Pacific Railway Company.

Fred G. Wright for St. Louis, Iron Mountain & Southern Railway Company; Missouri Pacific Railway Company; and Texas & Pacific Railway Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Complainant, a corporation engaged in the manufacture of various articles of woodenware at Tacoma, Wash., by petition, filed April 20, 1912, assails as unreasonable and unjustly discriminatory the carload rates charged by defendants for the transportation of wooden lard tubs from Tacoma, Wash., to Chicago, Ill., and to other eastern points. It asks that lower and nondiscriminatory rates be established for the future, and seeks reparation on past shipments.

Two schedules of rates are involved. In so far as based on minimum weights of 31,500 pounds for cars 41 feet or less in length, and 34,000 pounds for cars over 40 feet in length, they were at the time the petition was filed, as shown in the table on the following page.

These rates also applied to numerous other points and were subject to a rule which provided that where a carrier was unable to furnish a car of the capacity ordered by a shipper, and for its own convenience furnished a car of less capacity, the smaller car might be used on the basis of actual weight when loaded to its full visible capacity, or two smaller cars would be furnished to be used on basis of the minimum weight of the car ordered, provided the shipper did not order cars of dimensions not covered by the tariffs.

Rates from Tacoma, Wash., in cents, per 100 pounds.

To —		
Chicago, Ill ———	}	75
East St. Louis, Ill —		
Wichita, Kans ———		
Kansas City, Kans —		
St. Joseph, Mo ———	}	65
Sioux City, Ia ———		
Omaha, Nebr ———		
St. Paul, Minn ———		
Fort Worth, Tex ———		87½
Oklahoma City, Okla ———		80

Effective January 26, 1911, the carriers established lower rates to some of the points, but raised the minimum in connection with the reduced rates to 41,500 pounds, regardless of the length of the car, as shown in the following table:

Rates from Tacoma, Wash., in cents per 100 pounds.

To —		Cents
Chicago, Ill ———		65
St. Joseph, Mo ———	}	60
Omaha, Nebr ———		
Sioux City, Iowa ———		
St. Paul, Minn ———		55

The lower rates and higher minimum were subject to the rule referred to until April 22, 1911, when its further application as to them was prohibited. The higher rates and lower minimum weights were continued in the tariffs. November 2, 1911, the carriers established a rate of 80 cents to Fort Worth, and a rate of 74 cents to Oklahoma City and intermediate points, based on the higher minimum. The two sets were still in effect when this proceeding was instituted.

Complainant contends that the higher rates are unreasonable inherently and relatively, and that the higher minimum of 41,500 pounds applicable to shipments under the reduced rates is unreasonable, because except in rare instances that traffic can not be loaded to that weight; and it asks that the carriers be required either to apply a minimum of 34,000 pounds to the lower rates or to restore to the tariffs naming the lower rates and higher minimum the two-for-one rule.

The principal markets for the traffic are at Chicago and points on the Missouri River. About 95 per cent of complainant's output

is sold east of Denver, Colo., in territory generally designated as the middle west. The tubs are made of spruce and cottonwood obtained from the vicinity of Puget Sound, but the demand for them on the Pacific coast is very limited. They are used as containers of lard and other similar products of packing industries, vary in size from 20 to 85 pounds capacity, and are generally regarded as a low-grade commodity. The sizes shipped in greatest quantities are those of 60 and 80 pounds capacity. The evidence shows that in cars 50 feet in length it is possible to load the smaller tubs, varying in size from 20 to 28 pounds capacity, to the higher minimum of 41,500 pounds, but that such minimum can rarely be reached with tubs above 28 pounds capacity in the ordinary 50-foot car. A carload exclusively of the smaller sizes is ordered but rarely, and the result is that not more than 10 per cent of complainant's shipments can be loaded to the minimum prescribed for the reduced rates.

Complainant's chief competitors are located in the state of Wisconsin. In the early part of 1910, induced thereto by the fact that for several years the competition had shown increasing acuteness and force, complainant opened negotiations with the carriers with a view to obtaining a reduction in the rates to its principal markets. The lower rates of January 26 and November 2, 1911, with the higher minimum, were the outcome of these negotiations. The result not being satisfactory this proceeding was instituted. The carriers claimed that the higher minimum was involved in the negotiations for lower rates, and that such was the leading consideration that induced the rate reductions. The officer who conducted the negotiations for complainant testified, however, that nothing was said at the time about any change in the minimum weights, and that such change was not suggested until after complainant had entered into long time contracts for the delivery at Chicago and other markets of large quantities of its output on the basis of the promised lower rates. Whatever may be the merits of this dispute, the question before us is whether the existing rate adjustment is reasonable.

Under the existing rate adjustment a shipper may use the higher rates and lower minimum weights, with the privilege of the two-for-one rule, or he may use the reduced rates and higher minimum applicable to cars of all sizes, without the benefit of the two-for-one rule. It must be conceded that except as to orders for carload quantities of the smaller sizes (20 to 28 pounds capacity) which are of rare occurrence, the change in the rates resulted in little or no

benefit to the shipper. This fact can not be regarded, however, as of controlling weight, in determining the question of the reasonableness of the rates as now in force.

Complainant relies chiefly upon comparisons of car earnings on the commodity involved with car earnings on analogous commodities moving from Tacoma to the same points of destination. This is perhaps as fair a test of the reasonableness of the rates in question as is obtainable under the circumstances. The evidentiary force of such comparisons has not infrequently been recognized. *Florida Fruit & Vegetable Shippers' Asso. v. A. C. L. R. R. Co.*, 14 I. C. C., 476, 189-490; *In re Advances on Coal*, 22 I. C. C., 604, 620. The car earnings on wooden lard tubs under the higher rates and 34,000 pounds minimum from Tacoma to some of the destination points involved are shown as follows:

From Tacoma, Wash., to —	Rate per 100 pounds.	Car earn- ings.
	<i>Cents.</i>	
Chicago, Ill.	75	\$255.00
East St. Louis, Ill.	75	255.00
Kansas City, Kans.	65	221.00
Omaha, Nebr.	65	221.00
Fort Worth, Tex.	87½	297.50

The average loading of the commodity in cars of 50 feet in length is approximately 37,000 pounds. On the basis of 175 actual shipments loaded into cars varying in length from 49 feet 6 inches to 50 feet 3 inches, shown by a schedule filed with the record, the exact average was 37,345 pounds. Car earnings under the higher rates with an average loading of 37,000 pounds would be as follows:

From Tacoma, Wash., to —	Rate per 100 pounds.	Car earn- ings.
	<i>Cents.</i>	
Chicago, Ill.	75	\$277.50
East St. Louis, Ill.	75	277.50
Kansas City, Kans.	65	240.50
Omaha, Nebr.	65	240.50
Forth Worth, Tex.	87½	323.75

Under the lower rates and the higher minimum of 41,500 pounds the car earnings are shown in the next following table:

From Tacoma, Wash., to —	Rate per 100 pounds.	Car earnings.
	<i>Cents.</i>	
Chicago, Ill.	65	\$269.75
East St. Louis, Ill.	65	269.75
Omaha, Nebr.	60	249.00
Fort Worth, Tex.	81	336.15

Car earnings under the lower rates based on the minimum of 34,000 pounds and the approximate average loading of 37,000 pounds, are both shown in the next following table:

From Tacoma, Wash., to —	Minimum and average weight.	Rate per 100 pounds.	Car earnings.
	<i>Pounds.</i>	<i>Cents.</i>	
Chicago or East St. Louis.	34,000	65	\$221.00
	37,000	65	240.50
Omaha, Nebr.	34,000	60	204.00
	37,000	60	222.00
Fort Worth, Tex.	34,000	81	275.40
	37,000	81	299.70

It is to be observed that the lower rates applied to the minimum of 41,500 pounds produce greater car earnings than the higher rates applied to the 34,000 pounds minimum.

The same transcontinental tariff that contained the rates complained of on wooden lard tubs also named rates from Tacoma to the same destination points on such commodities as sash, doors, and blinds, wooden mantels, general woodenware, and wooden pipe, that produced much lower car earnings. The commodities, minimum weights, rates, and car earnings are shown in the next following table:

From Tacoma, Wash., to —	(*) Sash, doors, and blinds; minimum weight, 30,000 pounds. ¹		Wooden mantels; minimum weight, 20,000 pounds.		Woodenware; minimum weight; 16,000 pounds.		Wooden pipe; minimum weight, 30,000 pounds.	
	Per 100 pounds.	Car earnings.	Per 100 pounds.	Car earnings.	Per 100 pounds.	Car earnings.	Per 100 pounds.	Car earnings.
Chicago, Ill.	\$0.60	\$180	\$0.85	\$170	1.25	\$200	\$.75	\$225
East St. Louis, Ill.	.60	180	.85	170	1.25	200	.75	225
Omaha, Nebr. . .	.55	165	.75	150	1.25	200	.65	195
Fort Worth, Tex.	.78	234	.87½	175	1.25	200	.80	240

¹ Rates apply on sash, doors, and blinds manufactured from cedar, cottonwood, fir, hemlock, larch, pine, redwood, or spruce lumber.

Except in a few instances, the car earnings shown in the last table are not approximately as large as earnings that would accrue on wooden lard tubs at the lower rates of January and November, 1911, based on a minimum of 34,000 pounds. These tables show that sash, doors, and blinds, which are products of cottonwood and spruce as well as of other kinds of lumber, earn only \$180 per car to Chicago, whereas wooden lard tubs, also the product of cottonwood and spruce, earn \$255 per car to Chicago under the higher rate and lower minimum, and \$269.75 per car under the lower rate and higher minimum. To Omaha, Nebr., the car earnings on sash, doors, and blinds are \$165 per car, whereas on wooden lard tubs the earnings are \$221 per car under the higher rate and lower minimum, and \$249 per car under the lower rate and higher minimum. At the time this proceeding was begun the defendant carriers maintained a rate of 85 cents per 100 pounds, based on a minimum of 20,000 pounds, on tin cans, including lard pails, from Tacoma, Wash., to all the destination points here involved, producing earnings of \$170 per car. The same rate and minimum applied in the opposite direction, as is also true of other rates named in the last above table. As to all the rates and commodities referred to for comparison, the two-for-one rule applied under the tariffs.

Counsel for defendants, while conceding that a fair test of the reasonableness of the rates in question may be obtained by a comparison of car earnings, object to comparisons based on minimum weights and insist that to be of evidentiary force such comparisons should be based on the average actual load weight per car. It must be assumed, however, that the minimum weights established by the carriers are intended reasonably to comport with the loading capacity of the cars as to the particular commodities to

which they relate, and in the absence of direct testimony to show the average loading of the commodities referred to, which evidence is within the possession and knowledge of the carriers and within their power to furnish, we think it but fair and reasonable to compare the minimum weights on wooden lard tubs with the minimum weights applied to the analogous commodities, as a means to ascertain, approximately at least, the comparative car earnings.

It is doubtless true that the average actual loading of any given commodity would furnish more definitely the average car earnings as to that particular commodity, but to require shippers to furnish evidence of such actual car loading in all cases where comparisons of car earnings are relied on would be to place upon them a task practically impossible of performance, for the reason, already mentioned, that such evidence is in the possession of the carriers themselves and would be difficult of ascertainment by shippers. The car minimum gauge does not seem to be unfair to either the carrier or the shipper, and under the circumstances of this case we think such comparisons are justified and that from them reasonably just conclusions may be reached.

Upon the facts of record we are of opinion and find that the higher rates complained are, under present conditions, unjust and unreasonable, and that the minimum weight of 41,500 pounds, in connection with which the lower rates are applied, is also unreasonable. We further find that a reasonable minimum weight for the traffic is 31,500 pounds for cars 41 feet in length, and correspondingly lower or higher for cars under or over 41 feet in length, and that reasonable rates to be applied from and to the points in question are as shown in the following table:

<i>Rates from Tacoma, Wash., in cents per 100 pounds.</i>		
To —		Cents.
Chicago, Ill ————	}	70
East St. Louis, Ill —		
Kansas City, Kans —	}	65
St. Joseph, Mo ———		
Omaha, Nebr ————		
Sioux City, Ia ———	}	60
St. Paul, Minn ———		
Fort Worth, Tex ———		81
Oklahoma City, Okla }	}	74
Wichita, Kans ———		

Rates and minimum weights not to exceed those herein found reasonable, and subject to the two-for-one rule above referred to,

will be prescribed for the future. Under all the circumstances we are of opinion and find that no reparation on past shipments should be awarded, and the prayer of the petition in that respect is denied. *Anadarko Cotton Oil Co. v. A., T & S. F. Ry. Co.*, 20 I. C. C. 43; *National Wool Growers' Asso. v. O. S. L. R. R. Co.*, 25 I. C. C. 675; *Charles Boldt Co. v. C., R. I. & P. Ry. Co.*, 27 I. C. C. 11. An order will be entered in accordance with the conclusions herein announced.

MALT RATES TO TEXAS POINTS.

30 I. C. C. 385 (1914).

R. W. Flourney for Texas Brewing Company.

A. C. Fonda for Gulf, Colorado & Santa Fe Railway Company and Atchison, Topeka & Santa Fe Railway Company.

M. J. Dowlin for Chicago, Rock Island & Pacific Railway Company and Chicago, Rock Island & Gulf Railway Company.

J. R. Christian for Texas & New Orleans Railroad Company; Galveston, Harrisburg & San Antonio Railway Company; and others.

J. F. Garvin for Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company.

J. B. Payne for Texas & Pacific Railway Company and International & Great Northern Railroad Company.

P. H. Welborne for St. Louis & San Francisco Railway Company and St. Louis & San Francisco Railroad Company.

REPORT OF THE COMMISSION.

HALL, Commissioner:

This proceeding grows out of the protest of brewers in Texas against an advance of 4 cents per 100 pounds in freight rates on malt, published by the respondent carriers. These increased rates have been suspended by the Commission pending the outcome of its investigation herein.

The malt is moved in carloads from Chicago, Ill., and from points in Wisconsin and Minnesota, to Texas common points and is used in the manufacture of beer.

The rate for this movement of malt was fixed by the Commission in *Texas Brewing Co. v. A., T. & S. F. Ry. Co.*, 21 I. C. C., 171, by adding a differential of 5 cents per 100 pounds to the then existing rates on barley. The carriers contended in that proceeding that malt is a product of barley, as flour is of wheat, and the Commission in fixing the rates on malt used the differential of flour over wheat, which was long ago fixed by the Commission in *Board of Railroad Commissioners v. A., T. & S. F. Ry. Co.*, 8 I. C. C., 304.

After the expiration of the Commission's order in the *Texas Brewing Co. case, supra*, the carriers increased the rates on barley from Chicago and from points in Wisconsin and Minnesota to Texas common points, by 4 cents per 100 pounds. These increased rates became effective without protest. Thereafter the carriers filed the proposed rates on malt which include the advance of 4 cents per 100 pounds over the rates named by the

330. Malt Rates to Texas Points.

Brewers in Texas protest against increase in rates for malt. These rates suspended by ICC pending the examination. RRs had raised the rate of barley soon before and raised rate on malt now to correspond. Were allowed to have a 5-cent differential of malt over barley and admitted raise in barley was for purpose of raising malt. RRs wanted malt to go for not less than flour. Held: New rates not justified. RRs must cancel them. No reason for malt to be as high as flour.

up to March 27, 1909, the rate on barley from this territory of origin to Texas points was the rate applicable to corn chops. On that date it was reduced to the rate applicable to corn and oats, which was $2\frac{1}{2}$ cents less per 100 pounds than on corn chops. This effected a reduction of $2\frac{1}{2}$ cents per 100 pounds in the barley rates. It may be here observed that barley, being a whole grain, is more properly rated with corn and oats than with corn chops.

Further support of the rates here suspended proceeds upon the theory that the rate on malt should not be less than the rate on flour. This, it will be noted, goes beyond the doctrine laid down in the *Texas Brewing Co. case, supra*. Reference is made to the rates fixed by this Commission in *Farmers, etc., Club v. A., T. & S. F. Ry. Co.*, 12 I. C. C., 351, on flour from Kansas

points to Texas common points, and a comparison is offered of the revenue per ton per mile from such rates and from the proposed rates on malt. The Commission does not find this comparison helpful. The haul of the malt is substantially twice that of the flour. Respondent carriers contend that after making due allowance for the difference in distance, and under application of the rule that revenue per ton per mile should decrease with the increase of the distance, the proposed malt rates are on a lower plane than the flour rates set up in comparison. The general rule is well recognized, but we are aware of no measure or standard by which this Commission can find that the ton-per-mile units offered here vary *only* because of distance, and as to distance, vary properly.

While it may be true that malt rates may be scaled higher than barley rates, or even upon the same differential as flour rates over wheat rates, it does not necessarily follow that malt should take the same rate as flour. Malt is simply whole barley, germinated and swelled. Flour is a milled product. In value they rate about equally. Flour, however, is an article finished and ready for human consumption, while malt is merely one material used in producing an article of human consumption, i.e., beer. Malt loads more heavily than flour, and this is reflected in the minimum carload weights. It is less subject than flour to loss and damage in transit, and is adapted to methods and facilities of transportation ordinarily furnished for whole grains.

The carriers show that the total movement of malt to Texas points is far less than the total movement of flour to, from, through, and within the state of Texas. But there is nothing in this record to warrant a finding that the comparative movement of malt and flour to Texas points is such as to make just and reasonable a rate on malt approximately as high as on flour.

It is the view of the Commission that the proposed rates have not been justified, and the respondents herein will be required to cancel them.

HUMPHREYS-GODWIN COMPANY *v.* YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY *ET AL.*

31 I. C. C. 25 (1914).

R. G. Clarke for complainant.

E. K. Bryan, Jr., for Yazoo & Mississippi Valley Railroad Company and Illinois Central Railroad Company.

S. S. Stewart for Baltimore & Ohio Southwestern Railroad Company and Cincinnati, Hamilton & Dayton Railway Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Complainant is a corporation dealing in cottonseed products, with principal place of business at Memphis, Tenn. By complaint filed July 28, 1913, it alleges that charges assessed by defendants on basis of a joint through rate of 33 cents per 100 pounds for the transportation of 7 carloads of cottonseed meal from Helena, Ark., to Lewiston, Me., Danvers, Mass., and Walden, Burlington, Wolcott, West Hartford, and Concord, Vt., were unjust and unreasonable to the extent that they exceeded the charges which would have accrued upon the then existing combination of intermediate rates through Louisville, Ky. Reparation is asked.

The shipments described in the complaint moved during December, 1912, and January, 1913. They were originally consigned to complainant's order, Louisville, Ky., with the purpose and intent of recognising to points beyond. While the shipments were en route to Louisville complainant sent to the agent of the Illinois Central Railroad Company, at Louisville, the bills of lading together with written instructions to deliver the cars on arrival to the Baltimore & Ohio Southwestern Railroad Company. Concurrently it gave instructions to the agent of the Baltimore & Ohio Southwestern at Louisville to forward the shipments, when they should be received by it from the Illinois Central, to the final destinations above shown. These instructions were carried out.

The aggregate of intermediate rates contemporaneously in effect was 30½ cents, based on 11 cents to Louisville and 19½ cents beyond. Charges to Louisville were paid by complainant

at the rate of 11 cents based upon an aggregate weight of 280,000 pounds. Additional charges were paid at destination in the sum of \$620, being the balance of through charges based upon a joint through rate of 33 cents per 100 pounds from Helena to the points of destination, plus a demurrage charge of \$4 on one of the cars.

Complainant contends that the shipments were separate and distinct shipments to and from Louisville, and that the rates to and from Louisville should therefore have been applied. Without entering into a discussion of the arguments advanced by complainant in support of its contention we hold that the shipments were not handled under such circumstances as to have constituted a delivery to and reshipment by it from Louisville. We think it clear from the facts of record that these were through shipments and that the joint through rate was lawfully applicable. The question remains whether this joint through rate, being at the time in excess of the intermediate rates, was to that extent unreasonable.

At the time these shipments moved the through rate of 33 cents likewise applied, and still applies through the other Ohio River Crossings, namely: Cairo, Ill.; Evansville, Ind.; and Cincinnati, Ohio. Through Louisville, as stated, the combination of intermediate rates from Helena to the New England destinations in question was 30½ cents. The combination was also lowered through Evansville, being 31½ cents, made up of 11 cents to Evansville and 20½ cents beyond.

That portion of Fourth Section Application No. 2043 filed by the Yazoo & Mississippi Valley Railroad Company which asks for authority to charge a through rate from and to these points, in excess of the aggregate of the intermediate rates based on Louisville, was set for hearing in connection with this complaint. However, the rate on cottonseed meal from Helena to Louisville since November 18, 1913, has been 15 cents, and the aggregate of the intermediate rates at present in effect exceeds the joint through rate. Defendants contend that as the situation existing prior to the increase in the rate from Helena to Louisville was protected by a fourth-section application, no reparation should be awarded on the basis of the sum of the intermediate rates.

Ordinarily a through or joint rate ought not to exceed the combination of the intermediate rates applicable over the route of movement, and this Commission as early as December 21, 1906, stated:

"Many informal complaints are received in connection with regularly established through rates which are in excess of the sum of the locals between the same points. The Commission has no authority to change or fix a rate except after full hearing upon formal complaint. It is believed to be proper for the Commission to say that if called upon to formally pass upon a case of this nature it would be its policy to consider the through rate which is higher than the sum of the locals between the same points as prima facie unreasonable, and that the burden of proof would be upon the carrier to defend such higher through rate. [Tariff Cir. No. 14-A, rule 43; Tariff Cir. 18-A, rule 56-(b).]"

This doctrine has become well settled and it is now almost the universal rule that the through rate or charge should not exceed the sum of the intermediate rates. The fact that a joint rate does exceed the sum of the intermediate rates raises a strong presumption that such joint rate is unreasonable, but we have in several cases taken occasion to say that such a presumption is not to be regarded as conclusive; it may happen in exceptional cases that the through rate may properly be greater than the sum of the intermediate rates. We have recognized the fact that there are instances in which the circumstances and conditions might justify the higher rate. *Randolph Lumber Co. v. S. A. L. Ry.*, 14 I. C. C., 338, and *Michigan Buggy Co. v. G. R. & I. Ry. Co.*, 15 I. C. C., 297. When the joint rate exceeds the sum of the intermediate rates the burden is upon the carrier to defend such higher rates and rebut the presumption of unreasonableness. *Michigan Buggy Co. v. G. R. & I. Ry. Co.*, *supra*. Where the complainant makes no charge that the joint rate is unreasonable, but merely claims reparation upon the theory that the shipments were or could have been recognised, as it is claimed in this case they were, the Commission will not award reparation. *Wood Butter Co. v. C. C. C. & St. L. Ry. Co.*, 16 I. C. C., 374.

In *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C., 668, a blanket rate of 85 cents on lumber to the Pacific coast applicable from the territory between the Missouri River and the Atlantic seaboard was involved. We held that the rate was unreasonable from Chicago and Mississippi River points and ordered it reduced to 75 cents. One effect of our order was to make the combination of intermediate rates on the Mississippi River lower than the through rate from the territory east thereof. Thereafter in *White Bros. v. A. T. & S. F. Ry. Co.*, 17 I. C. C.,

288, complainants charged that this through rate was unreasonable to the extent that it exceeded the intermediate rates based on the Mississippi River and sought reparation on that ground alone. In that case we said, page 289:

"While the Commission has frequently held that through rates between certain points should not exceed the combination of local rates between the same points, this is not a universal rule, especially in the case of common rates from points in each of the contiguous group territories. We do not have sufficient evidence before us in the records in these cases to warrant findings that the through rate charged was unreasonable. We would be forced to reach that conclusion merely because there was at the same time in the case of some of the shipments a lower possible combination of locals than the through rate.

This ruling was adhered to in a number of subsequent cases involving the same question.

The complaint predicates the charge that the joint rate was unreasonable solely upon the fact that it exceeded the then existing combination of intermediate rates through the Louisville gateway. Complainant in its presentation of the case relied upon the presumption of unreasonableness arising from that fact and submitted no other evidence in support of its contention. Defendants undertake to rebut this presumption by showing the following facts:

First, they show that the service from Helena involves an expensive transfer by ferry across the Mississippi River to Trotters Point, but that, notwithstanding this, the through rate is only one-half cent per 100 pounds higher than from competing mill points east of the river from which no such expensive service is involved as that on Helena traffic. Second, it is shown that Helena is one of a group of points in eastern Arkansas from all of which the rate is 33 cents. It is asserted that the rate from Helena to these New England points would not be as low as 33 cents were it not for the fact that it is also reached by rail lines operating entirely west of the Mississippi River, which carry the same rate of 33 cents from practically all of their mill points. Third, the rates to Louisville from points on the Mississippi River, including, as we note, Greenville and Friars Point, Miss., and from points east of the Mississippi River located in the vicinity of Helena, and as far down on the Illinois Central Railroad's line as Winona, Miss., were 15 cents, while the joint through rate to New England points was, and is, 32½ cents.

Fourth, that from the other mill points west of the river taking the same through rate as Helena, namely, 33 cents, the rates to Louisville ranged from 17 to 22 cents.

Defendant contends that the joint through rate of 33 cents was properly constructed, and that the 11-cent rate to Louisville was too low. Their witness states that the latter rate was established through clerical or typographical error. How this error, if it were such, came about, or why it was permitted to stand until November 18, 1913, when the 15-cent rate became effective, is not explained. It is obvious that we can seldom, if ever, accept as justification of a situation of this kind the plea of error. To do so would but invite such a plea in all cases where it were possible to offer it. The defense of error can be availed of only where the circumstances are so clear and convincing as to leave no possible doubt of the fact.

Complainant has no complaint now to make of the joint rate of 33 cents; neither, it admits, has it any complaint to make that the subsequently established local rate of 15 cents from Helena to Louisville is unreasonable. It has not shown that it was damaged by the payment of charges at the 33-cent rate nor that it has been unduly prejudiced in the sale and shipment of cottonseed meal.

We do not have before us any evidence tending to show that the 33-cent rate is, or was, unreasonable *per se*, or relatively when compared with the through rate from other points in the same territory. On the other hand we think it satisfactorily appears that the 11-cent rate was so low, relatively, as to be out of line with rates to Louisville from all other points in the same general territory.

We have given full consideration to all the facts and circumstances appearing of record, and it is our conclusion that inasmuch as the situation was protected by an application for relief from the provisions of the fourth section, which had not been passed upon, and as the violation of the rule of that section has been removed, no reparation should be awarded. The complaint should be dismissed and it will be so ordered.

JOHN W. BOILEAU *ET AL.* v. PITTSBURGH &
LAKE ERIE RAILROAD COMPANY *ET AL.*

22 I. C. C. 640 (1912).

Wade H. Ellis, Louis D. Brandeis, Cyrus E. Woods, Charles M. Johnston, and Challen B. Ellis for complainant and intervening petitioner, Pittsburgh Coal Company.

W. M. Duncan and H. F. Baker for Henry W. McMaster and Francis H. Skelding, receivers of Wabash Pittsburgh Terminal Railroad Company, intervening petitioner.

O. E. Butterfield for Pittsburgh & Lake Erie Railroad Company and Lake Shore & Michigan Southern Railway Company.

A. P. Burghwin, W. M. Duncan, and F. D. McKenney for Pennsylvania Company; Pennsylvania Railroad Company; Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; and Pittsburgh & Ashtabula Railway Company.

REPORT OF THE COMMISSION.

MEYER, Commissioner:

This proceeding brings in issue the freight rate of 88 cents per net ton for the transportation of bituminous coal in carloads from the Pittsburgh, Pa., district, to Ashtabula Harbor, Ohio, for transshipment by vessel on the great lakes to points beyond. This, in common with coal transported between other producing points and lake ports, is known as "lake-cargo coal" and moves only during the period of open navigation.

The original complaint was filed on February 15, 1911, in complaint's own behalf and in behalf of shippers of lake coal from the Pittsburgh district. The complainant is a resident of Pittsburgh engaged in the business of buying and selling coal lands and property for himself and others. On May 13, 1911, a petition of intervention was filed by the Pittsburgh Coal Company, a corporation engaged in the business of mining and shipping coal from the Pittsburgh district, which adopted the original complaint as a part of its petition.

On August 19, 1911, the receivers of the Wabash Pittsburgh Terminal Railroad Company filed, on behalf of that carrier, a petition to intervene as a party defendant. Traffic originating on the line of this defendant and its subsidiary, the West Side Belt Rail-

road, moves to Ashtabula in connection with the Wheeling & Lake Erie Railroad. The other defendants, seven in number, are included within the New York Central and the Pennsylvania Railroad systems and forms two lines of shipment between the points in question.

The Pittsburgh district embraces, generally speaking, territory within a radius of 40 miles from the Pittsburgh courthouse. Known geologically, it is the Pittsburgh bed of coal which extends into southwestern Pennsylvania, eastern Ohio, and northern West Virginia and includes about 300 mines.

The general allegations of the complaint are that the aforesaid rate of 88 cents is excessive and unreasonable in and of itself; that it is discriminatory and constitutes an undue preference and advantage to the shippers of other localities over those of the Pittsburgh district and subjects said district to undue and unreasonable prejudice and disadvantage; and that a reasonable rate will not exceed 50 cents per ton. It is specifically asserted that the present rate has been fixed by agreement among the railroads so as to discriminate against the Pittsburgh field in favor of the West Virginia field; that the cost of producing coal is considerably greater in the Pittsburgh mines than in the West Virginia mines and that under the influence of existing freight rates the latter mines have increased their production proportionately more rapidly. In their brief the complainants summarize their position as follows:

"They are entitled to a fair and reasonable rate from the Pittsburgh district to Ashtabula Harbor, considered with reference to the cost of the service and the value of the service; the rate now in effect, when viewed in the light either of the cost to the carrier of hauling the coal or the value of the service rendered to the shipper or to the consumer, is extortionate; and there are no other considerations which might enter into the determination of a fair rate which would justify the rate in question.

The defendants deny the allegations of the complaint and contend that the rate in question is reasonable.

Testimony in this proceeding was taken by the Commission on five separate occasions; extensive briefs have been filed and oral argument made by the interested parties. The voluminous record thus submitted contains much information that is helpful to a determination of the issues involved.

The coal moving over the New York Central lines from the Pittsburgh district to Ashtabula is transported practically in solid

trains. Throughout the Pittsburgh district are various points on the Pittsburgh & Lake Erie road known as assembling yards. The empty cars are distributed to these yards and thence switched out to the mines. After loading, the cars are moved back to the assembling point and there made into solid trains for road service. The movement to Ashtabula is via the Pittsburgh & Lake Erie Railroad, Lake Shore Junction (Youngstown, Ohio), and Lake Shore & Michigan Southern Railway in trains averaging 65 cars each of 42 to 44 tons per car.

The coal moving via the Pennsylvania lines originates on the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad, the Monongahela and Pittsburgh divisions of the Pennsylvania Railroad, and the West Pennsylvania Railroad. It passes from the initial lines to the Pittsburgh, Fort Wayne & Chicago Railway and Pittsburgh, Youngstown & Ashtabula Railway, which transport it to Ashtabula. All of this traffic moves via Conway, Ohio, which is a very large yard and an assembling point for freight consigned to various destinations. The general superintendent of these lines testified that the movement into Conway is "not at all exclusively" solid train loads, and that his road makes no effort to move it in that manner. He further stated that from Conway to Ashtabula the average train load of lake coal contained about 40 cars, with an average tonnage of from 40 to 44 tons each.

While Ashtabula is distant from Pittsburgh proper only 124.6 miles via the Pennsylvania lines and 128.1 miles via the New York Central lines, the average distance from the district was stated by the assistant freight traffic manager of the Pennsylvania lines to be 148 miles via his lines and 152 miles via the New York Central lines. These figures, however, are based exclusively on mileage and take no account of the tonnage from the different mines. Upon the latter basis, by computing the actual railroad mileage and the actual tonnage from each mine, the weighted average distance is approximately 148 miles. This corresponds with the mileage given in a statement filed by the Pennsylvania Company in Investigation and Suspension Docket No. 26, the *West Virginia Lake-Coal case*, 22 I. C. C. Rep. 604, and will be used in this case as the distance a ton of lake coal is transported from the Pittsburgh district to Ashtabula, although our general conclusion would be no different if "straight" averages were to be used.

During the past 11 years the rate from the Pittsburgh district to Ashtabula Harbor, free on board cars there, has increased 15 cents, as follows:

Year.	Rate per net ton.	Year.	Rate per net ton.
	<i>Cents.</i>		<i>Cents.</i>
1901.....	73	1907.....	88
1902.....	73	1908.....	88
1903.....	83	1909.....	88
1904.....	83	1910.....	88
1905.....	83	1911.....	88
1906.....	83		

Owing to the prevalence of rebating prior to the amendments of 1906 to the act to regulate commerce, it was urged that little reliance can be placed upon the accuracy of this rate as an indication of the actual charge for transportation during that period. From 1887 to 1900 the rate fluctuated — being successively \$1, \$0.90, \$0.85, \$0.90, \$0.70, and \$0.80 — and a Pittsburgh operator testified that it was commonly understood by all shippers that there was a refund from this published rate to the lake shippers.

While the rate increased 20 per cent, the increase from 1901 to 1910 in tonnage of lake coal received over defendants' lines at Ash-tabula was approximately 320 per cent, as shown by the following table:

Year.	Coal shipped.	Year.	Coal. shipped.
	<i>Net tons.</i>		<i>Net tons</i>
1901.....	1,318,860	1906.....	2,619,483
1902.....	1,405,205	1907.....	3,235,538
1903.....	2,046,442	1908.....	3,027,538
1904.....	1,980,104	1909.....	3,167,851
1905.....	2,051,152	1910.....	5,573,392

Practically all of this tonnage originated in the Pittsburgh district, the record showing that for the year 1910, 4,814,526 tons moved over defendants' lines, of which the New York Central lines transported 2,221,312 tons and the Pennsylvania lines transported 2,593,214 tons. This movement, being restricted to the period of open navigation, was from about May 1 to November

15, a fact which makes the traffic desirable alike to the producers and the carriers. It comes at a time when the movement for domestic use has fallen off and when equipment is required at Ashtabula to transport the great volume of iron ore that reaches that port by vessel.

It is the contention of complainants that this ore movement is an important factor in the consideration of the cost of hauling the coal because it serves to remove the expense of any back haul of empty cars. An exhibit submitted by the deputy collector of the port of Ashtabula shows that in 1909 a total of 9,027,237 net tons and in 1910 a total of 10,751,599 net tons of ore were received at that point. It was testified that this tonnage was shipped over the lines of defendants as far as Youngstown, Ohio, and that about 60 per cent of the movement via the New York Central lines was to the Pittsburgh district. The general superintendent of the Pennsylvania lines stated that in 1910 his lines moved out of Ashtabula 79,592 carloads of ore. If, as before shown, the same lines moved into Ashtabula in 1910, 2,593,214 tons of coal, it appears that on basis of his estimate of from 40 to 44 tons of coal per car the number of cars of lake coal hauled from the Pittsburgh district to Ashtabula by the Pennsylvania lines was about 61,000 or over 18,000 cars less than the number of cars used in the ore movement from Ashtabula via the same lines. On behalf of the carriers it was suggested that the ore and coal movements not being strictly contemporaneous there resulted a corresponding amount of back haulage. However, it is undisputed that the volume of ore and coal tonnage is heavy during the open lake season and that each constitutes, in a measure at least, a back haul for the other; and since the ore tonnage is much greater than the lake-coal tonnage, there would appear to be ample ground for the assertion that there can be empty haulage for only a small part of the cargo coal, due possibly to the contingencies attendant upon vessels going and coming.

Much stress is laid by complainants upon the charge that by agreement among the railroads the rate of 88 cents was fixed so as to discriminate against the Pittsburgh field in favor of the West Virginia fields and that this rate is not the result of normal competition between the railroads running from the Pittsburgh district to Lake Erie or between those roads and others serving the West Virginia districts. It is a matter of record that the custom had obtained for many years for the representatives of the initial carriers of lake-cargo coal from the Pittsburgh, Ohio, and West

Virginia districts to meet and determine what rates should prevail from the mines to the Lake Erie ports. The rates so fixed from the West Virginia districts were, until March 1, 1912, as follows:

District.	Rate per net ton.	Differential in favor of Pittsburgh.
	<i>Cents.</i>	<i>Cents.</i>
Pittsburgh, Pa.	88	.....
Pocahontas, W. Va.	112	24
Kanawha, W. Va.	97	9
Fairmont, W. Va.	96½	8½

On basis of the average distance to all lake ports given in defendants' brief (not the weighted average) the ton-mile revenue accruing to the carriers under these rates is as follows:

District.	Distance.	Ton-mile revenue.
	<i>Miles.</i>	<i>Mills.</i>
Pittsburgh, Pa.	160	5.5
Pocahontas, W. Va.	434	2.6
Kanawha, W. Va.	400	2.4
Fairmont, W. Va.	248	3.9

It will be seen that the carriers in fixing the rates from these competing mining districts practically disregarded distance as well as the fact that the rail competition from the Pittsburgh district to Lake Erie may be expected to be, under competitive conditions, much greater than from any of the West Virginia fields. In March, 1909, the traffic managers of the interested lines, at a meeting in New York, decided to increase the differentials between the Pittsburgh and West Virginia fields by advancing the Pocahontas and Kanawha rates 9½ cents each and the Fairmont rate 3½ cents. This proposed change was first enjoined by a court and later suspended by this Commission. The propriety of the increased rate was passed upon in the *West Virginia Lake-Coal case* decided concurrently herewith, 22 I. C. C. Rep. 604, and the report

therein is referred to for a statement of the conditions prevailing in the West Virginia fields.

For 10 years prior to March 1, 1912, the differentials before shown were unchanged. Under this relation of the rates the coal tonnage from the West Virginia mines to the lake ports has increased from 739,011 tons in 1901 to 7,279,384 tons in 1911, or an increase of approximately 885 per cent, while the tonnage from the Pittsburgh district to the lake ports has increased from 2,704,059 tons in 1901 to 10,197,127 tons in 1911, or an increase of approximately 277 per cent. During the same period West Virginia's proportion of the total lake-cargo coal shipped from the Pennsylvania, West Virginia, and Ohio districts increased from 14.13 per cent to about 34.19 per cent, while the proportion shipped from the Pittsburgh field decreased from 51.69 per cent to about 46.59 per cent.

That this rate adjustment is not justified by any difference in the expense of producing coal is established by the testimony, which shows that it costs considerably more to mine a ton of coal in the Pittsburgh district than in West Virginia. The figures submitted by the Pittsburgh Coal Company, one of the largest shippers in the district, show that the total cost of production, including all overhead charges, of a ton of run-of-mine coal in 1905 was 89.43 cents, and in 1910 it was 97.82 cents, while the cost of three-quarters coal, which forms the greater part of the lake-cargo coal, is estimated at 10 cents additional. As against these costs, the testimony is that the West Virginia operators can and do sell at a profit their run-of-mine coal for as low as 65 cents per ton and their three-quarters coal (Fairmont) for 68 cents. It would seem to be safely within the range of actual experience as reflected in the various exhibits submitted in this case to say that it costs 80 cents to \$1 in the Pittsburgh district and from 50 to 60 cents in the West Virginia districts. In both fields instances are recorded which lie outside of this range.

A comparison of the rates from West Virginia and Pittsburgh to other markets supports complainants' contention that no advantages were given by the carriers to Pittsburgh operators to offset the lower basis from West Virginia to the lake. On coal shipped to the Atlantic seaboard for transshipment, the advantage in rates is with West Virginia, although in some instances it is not so accessible to the market. The following table shows some of the rates to tidewater, outside the capes, from Pittsburgh and other districts:

District.	Port.	Railroad.	Distance.	Rate per net ton.	Rate per ton per mile.
			<i>Miles.</i>		<i>Mills.</i>
Pittsburgh.....	Curtis Bay.....	Baltimore & Ohio...	299	\$1.28	4.28
New River.....	Newport News.....	Chesapeake & Ohio...	426.8	1.25	2.93
Clinch Val. No. 2...	Lamberts Point.....	Norfolk & Western...	458.3	1.25	2.73
Letrobe.....	Canton piers.....	Pennsylvania.....	291	1.05	3.61
Kanawha No. 3.....	Newport News.....	Chesapeake & Ohio...	551	1.34	2.43

In defending the rate of 88 cents to Ashtabula, which affords a ton-mile revenue of 5.94 mills under the weighted average distance of 148 miles, and approximately 5.87 mills under the straight average mileage stated in defendants' supplemental brief, the counsel for defendants rely upon twelve decisions wherein the Commission fixed rates on coal yielding per ton-mile revenues of 5 mills and upward. These rates apply between points such as Duluth to St. Paul; Chicago to Fort Dodge, Iowa; Oklahoma and Arkansas to Texas and Louisiana points; Wyoming points to Idaho points, etc., and the circumstances and conditions surrounding the traffic are so dissimilar in essential respects to the transportation from Pittsburgh to Ashtabula that it is difficult to see how these cases can be of assistance to the Commission in the present proceeding.

Chapter one of the argument in defendants' brief is devoted to an effort to show that "a higher rate for the identical service performed less efficiently has been approved by the Commission" in the case of *Imperial Coal Co. v. P. & L. E. R. R. Co.*, 2 I. C. C. Rep. 618. This case was decided on March 23, 1889, within two years from the effective date of the original act to regulate commerce. That conditions have materially changed since that time is demonstrated by the fact that in 1890 the freight density per mile of line operated of the Pittsburgh & Lake Erie Railroad was 2,324,243 ton-miles as against 9,224,394 ton-miles in 1911, while the operating expense per ton-mile of that road decreased from approximately 6.58 mills in 1890 to less than 4 mills in 1911.

We have already given figures showing the increase in the lake-coal tonnage from the Pittsburgh district. Taken at their face value, without reference to other data, they would appear to suggest undoubted prosperity in the coal industry in that district. By comparison with the figures representing lake tonnage from the West Virginia district it will be observed that there has been

relative retrogression and corresponding lack of prosperity. Not only in the instant case, but also in other proceedings now pending or recently decided, the position was quite generally taken by witnesses representing the mining interests that lake-cargo coal must to some extent be looked upon as surplus product which enables the operators to keep the mines in operation for a greater number of days in each year, to maintain their business organization intact, to hold the miners together, and to enable them to earn living wages. Defendants laid some stress upon the increased intensity of competition among the various coal fields, especially between the Pittsburgh and West Virginia fields. A general survey would strongly support this view. It is unquestioned that wages and the standard of living in the Pittsburgh district are generally higher than in most of the West Virginia districts, and that the cost of mining as a whole in the former district is greatly in excess of the cost in the latter, the exact extent of which is indicated in tables hereinafter given. Whatever weight it may be permissible under the statute to give to considerations of this kind in the determination of a question like that presented here, it would seem that wages of miners and their standard of living should be kept in view, and that great issues affecting them should not be decided without at least bringing their interests into the horizon of consciousness. Counsel for defendants argued that the profits of operators should be considered in this case. We interpret his argument to mean that all the conditions of every kind whatsoever surrounding this coal industry, which may be directly or indirectly affected by the rates, such as the profits of the operators and carriers, the wages and standard of living of the miners and railway employees, may be rightfully considered. Whatever legal limitations may be imposed upon this view by the act to regulate commerce as at present interpreted, from the point of view of public policy and humanity, considerations like those adverted to by counsel should most assuredly not be ignored.

The actual condition of the operators in the Pittsburgh district was described in great detail and some question was raised regarding the accuracy with which the situation was depicted. Detailed exhibits relating to items of expense in mining, wages, prices, etc., were introduced. After giving due consideration to the doubts cast upon their actual condition we are inclined to think that when witnesses and counsel for complainant said that generally speaking the operators in the Pittsburgh district were now standing with "their backs against the wall" and "struggling for existence,"

the situation was possibly not greatly exaggerated so far as this record discloses.

Not only in the Pittsburgh district, but in the Ohio districts — controversies regarding which are now pending before the Commission, and voluminous testimony with respect thereto already submitted — the desire to keep down the cost of mining has apparently resulted in wasteful mining operations, and to that extent has forever deprived the world of that much of its fuel supply. There is presented here, therefore, a problem in conservation of the most practical character, commented upon in the record at length, yet quite out of the range of our powers under the act to regulate commerce.

To reinforce what has been said with respect to mining conditions in the Pittsburgh district we give below a few comparisons based upon the testimony and exhibits in this case:

Analysis of cost of production, 1905-1910, Pittsburgh Coal Co.

Item.	Cost per ton.					
	1905.	1906.	1907.	1908.	1909.	1910.
Labor	\$0.6125	\$0.6374	\$0.6696	\$0.6782	\$0.6704	\$0.7187
Supplies	.0805	.0791	.0942	.0983	.0794	.0858
Fuel	.0160	.0138	.0170	.0205	.0194	.0191
Cost at mine	.7090	.7303	.7808	.7970	.7692	.8236
General office expense	.0347	.0279	.0306	.0431	.0391	.0360
Taxes, etc.	.0414	.0293	.0354	.0422	.0382	.0355
Depreciation	.0379	.0326	.0241	.0294	.0280	.0273
Royalty	.0713	.0736	.0828	.0863	.0674	.0558
Total overhead charges exclusive of bond interest and dividends	.1853	.1634	.1729	.2020	.1727	.1546
Total cost	.8943	.8937	.9537	.9990	.9419	.9782

Cost of coal on cars — West Virginia.

	Per ton.
Cost at face — average of 12 mines	\$0.2924
Labor (\$0.2046 less \$0.0682)	.1364
Supplies — same as Pittsburgh	.0941
Fuel — same as Pittsburgh	.0185
Total	.5414

West Virginia's advantage in the cost of machine mining.

	Cost per ton.	Differ- ence.
Coal from 5 to 6 feet:		
Pittsburgh.....	\$0.5425	.....
Kanawha —		
Eagle seam.....	.3531	\$0.1894
Boomer and other.....	.3050	.2375
Cabin Creek.....	.2830	.2595
Pocahontas-West Vivian.....	.2885	.2540
Island Creek-Holden.....	.2491	.2934
New River-Thayer.....	.4140	.1285
Coal River district.....	.3166	.2259
Coal from 7 to 8 feet:		
Pittsburgh.....	.4540	.....
Fairmont —		
Mongah mine No. 8.....	.2714	.1826
Gypsy mine.....	.2633	.1907
Federal Coal Co.....	.2991	.1549
Coal River district: Dorothy.....	.3166	.1374
Pocahontas district: Pocahontas Coal Co.....	.2168	.2372

Turning now to the condition of the carriers defendant in this case we call attention to a table which has been compiled from the annual reports filed with this Commission. This table shows in a general way the financial condition of each of the defendants under rates in force during the years named.

In the *West Virginia-Lake Coal case, supra*, there were introduced in evidence by defendants not only extensive data bearing upon the cost of transportation, but equally extensive investigations were conducted at the instance of the Commission. The statistical compilations thus obtained show in great detail the assembling and other terminal costs connected with the transportation of lake-cargo coal, as well as the line or movement expenses. In the instant case one comprehensive volume of 134 printed pages was introduced by a witness for complainant, showing in careful detail the manner in which the various primary accounts had been treated, and what statistical processes had been subsequently resorted to in arriving at the cost of transporting lake-cargo coal over some of the defendants' lines. A witness for the interveners testified in much detail regarding the cost of assembling coal in the Pittsburgh district and related items based

Annual average, 1907-1911: Financial results as shown by income account.

	Pittsburgh & Lake Erie.	Lake Shore.	Pennsylvania Company.	Pittsburgh, Cincinnati, Chicago & St. Louis.	Pennsylvania Railroad Company.	Washington, Pittsburgh Terminal.	West Side Belt.	Wheeling & Lake Erie.
Operating income, being operating revenues less operating expenses and taxes	\$6,492,477	\$13,494,518	\$13,805,107	\$9,184,485	\$40,525,075	\$279,118	\$111,851	\$1,478,168
Other income, being rents and returns on securities held	188,896	7,311,854	13,022,473	671,775	16,036,821	137,563	3,936	55,770
Gross corporate income	6,681,373	20,806,372	26,827,580	9,856,260	56,561,896	416,681	115,787	1,533,938
Payments for lease of road or rent (or loss) of other property	645,157	2,227,155	10,229,587	2,168,114	9,495,750	100,084	74,581	82,764
Interest on funded debt (accrued)	220,000	5,893,711	5,814,536	2,666,199	12,135,208	489,657	19,168	862,332
Dividends from income ¹	\$1,531,999	7,398,449	4,600,000	2,693,411	21,483,674	.....	.....	.....
Per cent on stock	(10 to 12)	(12 to 18)	(6 to 8)	(3½ to 5)	(6 to 7)	.....	.....	.....
Miscellaneous deductions	4,161	486,685	1,925,620	773,346	6,658,341	175,351	21,106	383,623
Appropriations for improvements, etc.	1,699,755	2,034,937	2,594,449	1,257,133	5,635,989	.....	.....	16,201
Average surplus from each year's business carried to profit and loss	2,580,300	2,765,434	1,663,388	308,057	1,132,933	446,142	931	189,017
Total deductions	6,681,373	20,806,372	26,827,580	9,856,260	56,561,896	416,681	115,787	1,533,938

¹ Does not include additional dividends declared from surplus.² Extra dividends from surplus in 5 years, 65 per cent.³ Extra dividends from surplus in 5 years, 33½ per cent.⁴ Does not include 2½ per cent on preferred and 2 per cent on common, payable in 1907.⁵ Deficit.

upon coal-company experience. The testimony of these two witnesses is mutually supplementary and throws much light upon the expense of transporting coal from the Pittsburgh district to Ashtabula. We have supplemented the analyses made by the various witnesses in these different coal cases by independent tests of our own. In one of these processes we made two general assumptions — (1) that all branches of the defendants' business yield an equal per cent of net revenue, and (2) that the operating ratio of all branches except freight is 100 per cent, and that, therefore, freight yields the entire net revenue earned by the carriers. It is obvious that the figures which are based upon the assumption that the freight branch of the business yields the entire net revenue results in figures representing the minimum freight cost, while the other set, based upon the assumption of equal net revenues in all branches, results in maximum figures. These comparisons seem to show that the cost statistics submitted by complainants are quite within the range of actual experience if the coal traffic to the lake is considered by itself without reference to the traffic as a whole, but that they lie very near the minimum, if not below, rather than the average or the maximum. In one instance our check of the figures would seem to suggest that the minimum had been closely approximated, while in a part of another calculation the maximum had been somewhat exceeded.

The following table indicates the maximum and minimum freight costs referred to above:

Estimated operating expense per ton for 148 miles, average for all freight, for fiscal year ending June 30, 1911.

	Pittsburgh & Lake Erie	Lake Shore.	Pennsylvania Co.
Per cent products of mines are of tons carried	77.21	57.87	72.99
Average haul .....miles.....	64.25	167.14	80.72
Average tons per train	1,214	603	487
Operating expense per ton for average haul:			
Maximum .....cents.....	23.85	63.25	32.22
Minimum .....do.....	20.22	49.71	27.28
Allowing 10 cents as independent of distance, the road expense is—			
Maximum .....mills.....	2.156	3.186	2.753
Minimum .....do.....	1.591	2.376	2.141
Total operating expense for 148 miles, per ton —			
Maximum .....cents.....	41.91	57.15	50.74
Minimum .....do.....	33.55	45.16	41.09

Taken all together these different statistical results point in the same direction and tend to show that the operating expense of transporting Pittsburgh coal to Ashtabula is probably less than one-half of the present rate of 88 cents.

Early in the hearing, petitioners submitted a series of requests for statistical information. During the course of the hearing and again at its close some of these requests were repeated, in groups or in their entirety. They included requests for copies of defendants' annual reports to their stockholders for the years 1909 and 1910, and viewed generally they related to such matters as tonnage involved, the number of men and their wages concerned in the assembling and movement of lake coal, empty-car movement, etc. After considering carefully all the information available in connection with the West Virginia cases, the testimony and exhibits of the various witnesses in the instant proceeding, and the data contained in the annual reports filed by the defendant carriers with this Commission, we did not feel justified in putting defendants to the trouble and expense of furnishing the information called for by the petitioners. During the course of the hearing, and while some of these requests were urged with particular force, we made a careful estimate of the amount of time and money which compliance with such requests would involve. While some of them would have cost very little or nothing, all of them taken together would have involved the expenditure of a very substantial sum of money. It is a fact that the defendants practically ignored all testimony bearing upon the cost of conducting this business, except for general allegations of counsel upon the argument that he was not at all clear that expenses did not increase with improved facilities. If, contrary to general impression and logical expectation, a more highly developed and better equipped railway can not do business on as low a basis per unit of traffic as a railway less developed and with poorer equipment, that conclusion should be clearly and unmistakably demonstrated and proven, and not be accepted on vague impressions or general allegations before consequential action is taken based upon it. Since some of the information requested by the petitioners bearing upon the cost of conducting transportation in the coal trade could have been furnished without appreciable trouble or expense, it must be presumed that the defendants realized the futility of defending the 88-cent rate by reference to the cost of conducting the business to which the 88-cent rate applies. Whether this was the view of the carriers or not, such is the

fact. Every combination and analysis of figures which has been, and we believe can be, legitimately made, or with any degree of propriety applied, points unmistakably to a cost of transportation much too low to serve in the slightest degree to defend the 88-cent rate.

To be sure costs do not determine rates; yet most rates have within them as a constituent the element of cost. Cost is generally an important element in arriving at a judgment with respect to a rate. What weight shall be given to that element as compared with all the other elements entering into a particular rate, such as the value of the service, with its bundle of constituents, and the various conditions surrounding the particular traffic, is a matter to be decided in each individual case. Questions regarding the calculation of the cost of service and the weight to be given to such cost suggest controversies which are as old as the railway itself. As between the two cardinal principles of rate making — the cost of the service and the value of the service — the first is decidedly more capable of exact determination and mathematical expression than the latter. If, as some would have us believe, no measure has yet been discovered for ascertaining the cost of the service, what measure is there suggesting anything definite and tangible and sufficiently practical in its application to carry conviction which can be applied to the value of the service? By which, after all, we mean to say little more than that the cost of the service is ascertainable with much more precision and capable of more tangible expression than the value of the service. Nevertheless both cost and value must be considered as well as all other elements entering into a rate.

As the annual reports to Congress demonstrate, this Commission has for many years felt the necessity of having information regarding the value of the physical properties of the carriers in the United States as an element in the valuation of their entire properties. The want of this information is a serious handicap in the proper consideration and disposition of the instant case. There is before us nothing whatsoever upon which we could with any degree of confidence arrive at an approximation of the value of the property devoted to the public use and upon which these carriers are entitled to a fair return and to which the lake-cargo coal traffic should make its fair and just contribution. To be sure we have before us figures representing the aggregate outstanding bonds and stocks, but it is well understood that the total capitalization of a carrier is not necessarily a correct measure of the value

of the property devoted by it to the public use, nor in many instances even a fair indication of what the value of such property might be. A compilation showing the comparative growth of capitalization and of traffic for all the railways in the United States reflects a gradual tendency toward a decrease in capital charges as the density of the traffic increases. For instance, in 1890 the capitalization per unit of traffic adopted in such a compilation was approximately 7.50 cents, while in 1909 it was approximately 5.25 cents. Because of the fundamental changes in the forms of accounts beginning with the fiscal year 1908, some of the defendant carriers have shown a marked increase in capital charges per unit of traffic in recent years, contrary to the general tendency. It appears that formerly some of them charged to operating expenses great sums which, under the new rules of accounting, can not thus be charged, and in consequence the capital account has been correspondingly increased. This would account in part at least for the deviation from the general rule. It is difficult to say, in the absence of proper valuation figures, what additions should be made to operating expenses for capital charges. For the leading railways in the United States during the year 1911, 13 had an operating ratio in excess of 75 per cent; 32 between 65 and 75 per cent; 15 from 55 to 65 per cent; and 4 under 55 per cent. That of the New York Central & Hudson River Railroad Company was 73.9; of the Pennsylvania Railroad, 72.15; of the Pennsylvania Company, 68.28; while that of the Pittsburgh & Lake Erie was but 49.42. These ratios would seem to indicate that if there is added to the ascertained operating expense 50 per cent for capital charges, we arrive at an equivalent of the operating ratio of 66 $\frac{2}{3}$ per cent, which is approximately near the lower margin of averages for the leading railways in the United States. If two-thirds of the operating expenses were to be added to such expenses the equivalent of an operating ratio of 60 per cent would be arrived at, and a fairly liberal treatment would be accorded to the carrier in this respect. All of which, however, simply goes to confirm the view that in the absence of reliable figures which represent the value of the property, estimates of cost, such as those which stand upon the record in this case, are mere approximations — especially when applied to a specific branch of the traffic — which are interesting and to a certain extent useful as general guides, but which can not be relied upon as decisive factors.

Defendants have argued with much pertinacity that the pending question is exclusively a question of differentials. The differ-

ential is certainly involved, because a change in one of a series of related rates changes the relation among all of them. While the differential is involved, that is not all that is involved. The testimony of the defendants makes the Pittsburgh-Ashtabula rate the keystone of the entire system of lake-coal rates. This keystone is involved in this proceeding. It determines the relative level of all other rates in the structure and should, therefore, be considered carefully and deliberately as a rate in and of itself without reference to any other rate.

Viewed in the light of all the evidence and our own inquiries, the 88-cent rate looks high. Complainants assert that there exists no power anywhere to let a shipper into a market by advancing the rate to another shipper. If the rate which the other shipper is paying is unduly low, we doubt whether this contention is tenable, and to this extent the general principle appealed to does not appear to us to be sound. But even though counsel have stated their contention somewhat too broadly, as applied to the situation in the Pittsburgh district, it appears to point to the truth in this case. We think it only a fair inference from this record that the Pittsburgh rate was raised step by step, not to bring it up to a level which the carriers might have regarded and defended as reasonable, but in order to let certain competing coal fields into the lake trade. And the record is conclusive that it is not a competitive rate.

Defendants argue that the lack of prosperity among the Pittsburgh operators is due to excessive competition among the operators in the different districts. Granting that this be so, does that justify the imposition of an excessive rate upon the traffic from one of the competing fields? The Pittsburgh field is entitled to a reasonable rate whether it brings the expected relief or not and irrespective of the specific channels into which the amount of the reduction in the rate will flow.

By comparison with the rates from other important coal-producing areas to important consuming areas, such as the rates from the West Virginia and Illinois fields, the Pittsburgh rate is high. It should also be borne in mind that the rail rates on lake-cargo coal are in reality portions or divisions of through charges covering long-distance traffic.

We have made careful estimates of the probable effect upon the defendant carriers and upon the traffic from the various coal fields of a reduction in the 88-cent rate to various levels from 50 cents up. In making these estimates we have considered not only the

total tonnage directly involved, but also the collateral tonnage and the effect of the whole alike upon carriers, operators, and consumers. This means that we have also considered readjustments which it may be necessary to make in other rates through the establishment of various differentials and their probable effect upon the carriers and all other considerations in the record which it was possible for us to bring to bear upon the issues here presented. After very careful deliberation and consideration of all the factors which enter into the contentions as presented by both sides in this controversy, we believe that the rate on lake-cargo coal from the Pittsburgh district to Ashtabula should hereafter not exceed 78 cents per net ton.

From the point of view of the specific cost of doing this particular business this rate is still too high; but, as we have said before, cost is only one of the elements entering into a rate. When we consider the coal rates from all the fields which will be affected by this change in the Pittsburgh rate, the disturbance in established differentials, the possible deflection of the currents of coal trade and its effect upon operators elsewhere, the effect upon the carriers directly involved and the indirect effect upon other carriers, and all the other valid considerations, we are forced to the conclusion that a rate lower than this would not be just and reasonable under the conditions disclosed by this record.

The intervening defendant and its Pittsburgh connections will find this traffic profitable to the extent that they can get it. The necessitous circumstances in which this defendant finds itself as a result of events not connected with the Pittsburgh lake-coal traffic can not be accepted as the measure of reasonableness of a rate to be imposed upon that traffic in the future.

In view of all the matters herein set forth it is our opinion, and we therefore find, that the present rate of 88 cents is unjust and unreasonable, and that the defendants shall maintain for a period of two years from the date hereof a rate not to exceed 78 cents from the mines in the Pittsburgh district to Ashtabula Harbor, Ohio.

An order in accordance with these conclusions will be issued.¹

¹ See *Pittsburgh Vein Operators of Ohio v. Pennsylvania Coal Co.*, 24 I. C. C. 280 and *In Re Investigation of Advances in Rates*, 20 I. C. C. 307, 357. — Ed.

MERIDIAN FERTILIZER FACTORY *v.* VICKSBURG,
SHREVEPORT & PACIFIC RAILWAY COMPANY *ET AL.*

20 I. C. C. 554 (1911).

S. R. Jennings for complainant.

V. Schaffenburg for Vicksburg, Shreveport & Pacific Railway Company.

T. J. Shelton for Arkansas, Louisiana & Gulf Railway Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Complainant is engaged in the manufacture and sale of commercial fertilizer, and has its principal office at Shreveport, La. By complaint, filed October 24, 1910, it attacks the reasonableness of defendants' carload rates for the transportation of commercial fertilizer from Shreveport, La., to Hamburg and Crossett, Ark.

Hamburg and Crossett, while practically equidistant from Shreveport, are about 14 miles apart, Hamburg being on the main line and Crossett on a branch of the Arkansas, Louisiana & Gulf Railway. Traffic from Shreveport to these points moves over the Vicksburg, Shreveport & Pacific Railway to Monroe, La., thence over the Arkansas, Louisiana & Gulf.

The complaint alleges that the rates from Shreveport to Hamburg and Crossett are, respectively 12½ cents and 16 cents, and the distances 152 and 149 miles, while from Memphis via the St. Louis, Iron Mountain & Southern Railway to the same points, respectively, 218 and 230 miles distant, the rate is 13 cents, out of which the Iron Mountain pays 1½ cents per 100 pounds bridge toll at Memphis. Complainant seeks to have established rates from Shreveport that will yield defendants the same revenue per ton-mile as is received by the Iron Mountain for its haul from Memphis. On this basis the rate from Shreveport would be 8½ cents. When the complaint was filed the rates were as alleged. By tariff effective February 20, 1911, the rate to Crossett was reduced to 13 cents. At the hearing defendants admitted that Hamburg and Crossett should take the same rates and expressed their willingness to publish the 12½-cent rate to both points. This proposed adjustment was not satisfactory to complainant, which contended for the same per-ton-mile rate as applied from Memphis. The following table shows the rates now effective and those proposed:

	Miles.	Rate.	Effective.	Revenue per ton per mile.
		<i>Cents.</i>		<i>Cents.</i>
Shreveport to Crossett.....	149	16	Until Feb. 20, 1911	2.148
Do.....	149	13	After Feb. 20, 1911	1.740
Do.....	149	12½	Proposed.....	1.677
Shreveport to Hamburg.....	152	12½	.....	1.644
Memphis to Hamburg.....	218	13	May 2, 1910.....	1.192
Memphis to Crossett.....	230	13	do.....	1.130

Complainant gives no consideration to the fact that the revenue per ton-mile ordinarily decreases as distance increases and that a per-ton-mile revenue reasonable for a haul of 250 miles might be too low for a 150-mile haul. Nor has the Commission ever inclined to the view that mileage is the only factor to be considered in rate adjustment. The fertilizer rates from Shreveport to Arkansas points have previously received our consideration, and in *Virginia-Carolina Chemical Co. v. St. L. S. W. Ry. Co.*, 16 I. C. C. Rep., 49, we said:

"Fertilizer is a low-grade traffic, subject to no great risk in transit and requiring no special service for its transportation in the sense that 'special service' is generally understood. Its free movement and use is an auxiliary tending to produce and furnish a larger volume of traffic and thus promote the prosperity of carriers and their patrons, so that considering both commercial and transportation conditions it is entitled to comparatively low rates."

Reasonable rates were then prescribed, among others the following:

Shreveport, La., to —	Miles.	Former rate.	Rate pre- scribed.	Revenue per ton per mile.
		<i>Cents.</i>	<i>Cents.</i>	<i>Cents.</i>
Thornton, Ark.....	138.9	11	9	1.30
Fordyce, Ark.....	144.5	11	9	1.24
Kingsland, Ark.....	152.1	11	9½	1.25
Rison, Ark.....	162.1	12	10	1.23

In that case, however, the entire haul was performed by one carrier, the St. Louis Southwestern, while in the present case there is

a two-line haul, the portion from Monroe to Hamburg and Crossett being over the Arkansas, Louisiana & Gulf, a comparatively new line. In *Virginia-Carolina Chemical Co. v. St. L., I. M. & S. Ry. Co.*, 18 I. C. C. Rep., 1; *Same v. St. L. & S. F. R. R. Co.*, 18 I. C. C. Rep., 5; and *Same v. C. R. I. & P. Ry. Co.*, 18 I. C. C. Rep., 31, we established the following rates on fertilizer, minimum carload weight 30,000 pounds, from Memphis to Arkansas points, applicable in some instances over only one line, and in others over more than one line:

Distance (miles).	Rate.
	<i>Cents.</i>
100 and over 75.....	9
150 and over 100.....	10
200 and over 150.....	11
250 and over 200.....	12
300 and over 250.....	13

Under all the circumstances we are of opinion and find that defendants' present rates on fertilizer from Shreveport, La., to Hamburg and to Crossett, Ark., are unreasonable and excessive to the extent that they exceed 11 cents, minimum 30,000 pounds, to both points. Defendants will be required to maintain for the future a rate not in excess of 11 cents per 100 pounds, minimum carload weight 30,000 pounds, and it will be so ordered.¹

BOARD OF RAILROAD COMMISSIONERS OF THE STATE
OF KANSAS *v.* ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY *ET AL.*

22 I. C. C. 407 (1912).

REPORT OF THE COMMISSION.

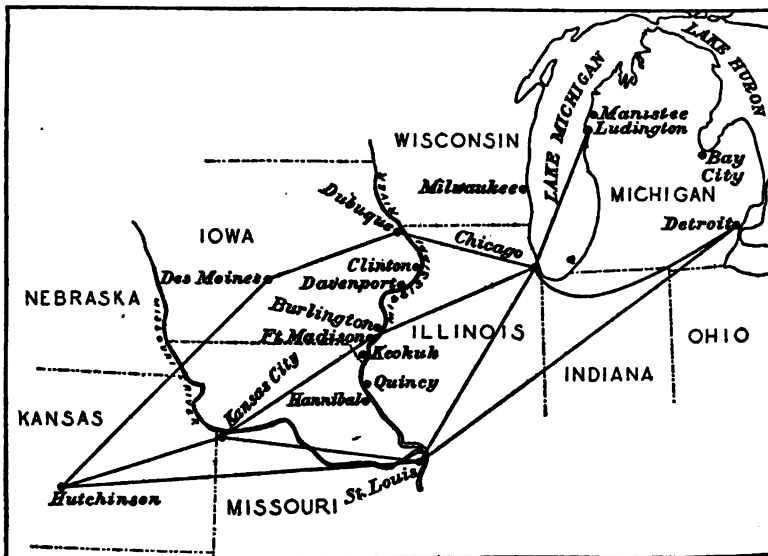
PROUTY, *Chairman*:

This proceeding involves the relative distributive rates on salt from the Kansas as compared with the Michigan field into intermediate territory. The situation will be best understood by a glance at the accompanying map.

¹ But see *Coke Producers Association, etc. v. Baltimore & Ohio R. R. Co., et al.*, 27 I. C. C. 125, 140. — Ed.

The Kansas salt field extends about 120 miles north and south by some 60 miles east and west. Hutchinson is situated near the center of this field and may be selected as typical of the whole field. Rates from all points of production in this field to the disputed territory are the same, there being therefore no competition in the rate between different points of production in this field.

The Michigan field covers nearly the entire lower peninsula of the state of Michigan, extensive salt works being located at Ludington, Manistee, Bay City, Port Huron, Detroit, Saginaw, and some other points. This field is therefore more extensive than the Kan-



sas field. Rates at the present time are substantially the same from all points in the Michigan field to the destinations in controversy; but, owing to conditions of transportation, which will be later referred to, there has been in the past active competition in rates between the Michigan points of production themselves, which has produced, at times, differences in those rates, some vestiges of which still remain.

It will be seen by reference to the map that as salt moves from the Kansas field east and northeast it meets salt moving from the Michigan field in the opposite direction, the debatable ground being, roughly speaking, between the Mississippi and the Missouri rivers. The cost of producing salt in Kansas and Michigan is substantially the same. The quality of the salt is about the same,

although this record indicates that at the same price the Michigan salt sells somewhat more freely. Whether, therefore, this intermediate territory shall be supplied from Kansas or Michigan depends mainly upon the rate of transportation.

This proceeding is instituted by the Kansas railroad commission in the interest of the salt producers of that state, and the complaint is:

1. That the rates from the Kansas field into this disputed territory are unreasonable in and of themselves.
2. That these rates are unduly high in comparison with corresponding rates from the Michigan field.

Certain salt producers in Kansas have intervened in favor of the prayer of the complaint, and certain producers in the Michigan field against it, so that the whole situation is before us.

In support of its contentions the complainant relies first and largely upon the fact that under the present rates Kansas producers are not only unable to increase their production, but can not even maintain that of recent years, while production in the rival Michigan field is increasing; and this phase of the case may be referred to before proceeding to a discussion of the rates themselves.

This record does not show in a very satisfactory way the relative production of these two fields, past and present. When this same matter was before the Commission in 1891 it appeared that production in the Kansas field was about 1,000,000 barrels annually, as compared with 4,000,000 barrels in the Michigan field, while it now appears that in 1909 the corresponding figures were 2,500,000 Kansas, 6,000,000 Michigan. If, therefore, we compare the present with 20 years ago the percentage of development has been in favor of Kansas.

It is said, however, that in 1891 the Kansas field was in its infancy, and this record indicates that for the last few years there has been little increase in the Kansas field, while Michigan production has shown a substantial advance. It is suggested that this is due, not to any undue advantage which Michigan enjoys into this territory, but rather to the fact that other sources of production have been developed to the south and west of Kansas, which have limited its market in those directions.

The inherent reasonableness of the rates in controversy will be first considered.

The original complaint directed attention especially to the rate from the Kansas field to St. Louis. That rate then was and now is

13½ cents per 100 pounds for a distance of approximately 500 miles. Is this unreasonable *per se*?

Salt is very desirable traffic from a transportation standpoint. It loads heavily, is not liable to loss or damage in transit, can be handled at the convenience of the carrier, and affords a uniform business. Its value is comparatively little, being from \$1.50 to \$2 per ton at the point of production. While not consumed as largely as coal, cement, brick, and similar commodities, and while therefore the freight rate is not so noticeable, it is an article of universal and necessary consumption. All these considerations call for a low rate of transportation, and have been repeatedly recognized by this Commission. It is also true that the ability of a particular producer to sell in a given market has depended largely upon the cost of transportation, and this in turn has operated to force down rates generally, so that salt rates in this territory, certainly, have been established by the voluntary action of the carriers at a low level. Notwithstanding, however, all these considerations which make for a low charge in the handling of this commodity, we are unable, upon any theory, to hold that a rate which pays only 5 mills per ton-mile is unreasonable in and of itself. While this record shows that lower rates have been maintained in the past under stress of competition and are in some cases being maintained to-day, and while if a carrier maintains a lower rate in favor of one locality it may perhaps be required to accord similar treatment to some other locality, we can not hold that the maintenance of this rate is inherently unreasonable.

The rates established by the state commissions in the two states through which this transportation is mainly conducted are instructive. They can not be given for distances as great as that involved in the St. Louis rate, but for 400 miles they are: Missouri, 15½ cents; Kansas, 15½ cents.

While the attack of the complaint is mainly directed against the St. Louis rate, the intervening petitions put in issue rates from the Kansas field to Mississippi River crossings north of St. Louis, and these should also be referred to.

It will be noted from the map that Hutchinson lies nearly due west of St. Louis. Since the course of the Mississippi River is nearly north and south, it follows that the upper crossings are farther from the Kansas field in an air line than is St. Louis, and although the actual mileage from Hutchinson to some of the more northerly crossings is less than to St. Louis, the average from the entire Kansas field would ordinarily be greater. Having reference

to distance, therefore, the rate to the upper crossings might well be somewhat higher than to St. Louis. Those rates are the same to Hannibal and Quincy, 15 cents to Keokuk and Fort Madison, and 18 cents to Burlington, Davenport, Clinton, and Dubuque. The distance from Hutchinson to Dubuque is 610 miles, as compared with 500 to St. Louis.

Considered as a whole, the increase to the upper crossings where it occurs seems to be fairly justified by an increase in distance over St. Louis, and we hold, with respect to all these Mississippi River rates, that they are not unreasonable *per se*. Considering the whole situation, they are perhaps sufficiently high, but cannot be pronounced excessive.

This proceeding also puts in issue rates at interior points in Iowa and Missouri, and these rates are sometimes slightly higher than those to the Mississippi River, although the distance is somewhat less.

While the reasonableness of rates from the Kansas field to points west of the Mississippi River is put in issue, but little, if any, attention was directed to those rates. They are in many cases blanket rates, the same from both the Kansas and the Michigan fields, so that the same rate applies through a considerable variation in distance. It is quite probable that some of these rates might upon detailed examination be found excessive, but there is nothing in this record upon which we can base an intelligent opinion, nor do we feel called upon at this time to examine the rate from the Kansas field to each one of these numerous points. Without prejudice to the right to find upon fuller investigation that some of these charges may be excessive, we do not at this time find that the charge of unreasonableness is sustained in any of the cases covered by this complaint.

While the Kansas interests have alleged that these rates to the Mississippi River from the Kansas field are excessive and have insisted upon that claim, it is evident that this is not the real objective point. The Kansas producer is interested not in the absolute rate from his field to this intermediate territory, but in the relative rate made from his plant as compared with that from the plant of his Michigan competitor. As already suggested, a few cents more or less in the rate from the Kansas field does not increase or diminish the total amount of salt consumed, but it may absolutely determine whether that salt shall be produced in Kansas or in Michigan. The real purpose of this proceeding is to secure a readjustment of rates between these competing fields.

At the date when this complaint was filed rates upon package salt from Detroit to St. Louis were, for local consumption, $11\frac{1}{2}$ cents; when for beyond, $8\frac{1}{2}$ cents. There was also a rate on bulk salt of $7\frac{1}{2}$ cents. The distance from Detroit to St. Louis is almost exactly the same as from Hutchinson, from which the lowest available rate was $13\frac{1}{2}$ cents; and the Kansas producer insisted that if these rates were maintained from Detroit, then the rate from the Kansas field was too high and should be reduced. The St. Louis rate was made the principal point of attack, and we may properly inquire whether the rates in effect to this market from Detroit and from the Kansas field discriminate in favor of Detroit.

Since the filing of the complaint, rates from Detroit have been advanced and now are upon package salt $11\frac{1}{2}$ cents local, 10 cents proportional; upon bulk salt 9 cents. Our discussion will be addressed to the present rates.

The defendants urge at the outset that whether the adjustment be proper or improper undue discrimination can not be affirmed, for the reason that the carriers which make the rate from the Kansas field are not the same as those which make that from Detroit. It is well understood that if the same carrier serving both Kansas and Detroit names a lower rate for substantially the same distance from Detroit than from Kansas, it must be prepared to justify that discrimination, but if carrier A serves St. Louis from the Kansas field, while carrier B serves that market from the Detroit field, then carrier A is not guilty of discrimination because it declines to meet the rate established by carrier B.

The answer of the complainants to this claim of the defendants is that the Wabash Railroad, which is the short line from Detroit to St. Louis, and which names the low rate between those points, also extends from Kansas City to St. Louis and joins in the rates from the Kansas field to the same market. They point to the previous decisions of this Commission in which we have held that a carrier which is party to a joint rate may be held responsible for that rate and for any discrimination which results from its maintenance.

Two questions would seem to be open to inquiry:

(a) Is the Wabash Railroad justified in naming its present rates from Detroit to St. Louis?

(b) Does that carrier, or can that carrier so control the rate from the Kansas field to St. Louis that it should be held answerable for the discrimination which results from a failure to reduce that rate to correspond with the Detroit rate?

It will be seen upon a reference to the map that the salt-producing points of Michigan are located mainly upon the water. They are, upon the western side of the peninsula, Manistee and Ludington upon Lake Michigan, and upon the eastern side, Bay City, Port Huron, Wyandotte, and Detroit upon Lake Huron. It was said in testimony that salt was produced in Michigan, in quantities, at but a single interior point, Saginaw, which lies in close proximity to the water.

The distance from Ludington and Manistee to Milwaukee and Chicago is from 100 to 150 miles. It appears from this record that salt has for many years been transported from these points of production by water to both Milwaukee and Chicago. Much of this transportation is in boats owned by the producers of the salt; but there is to-day, and for some time has been, a regular tariff of the Pere Marquette steamers naming a rate of $2\frac{1}{2}$ cents from both these producing points to Milwaukee and Chicago.

While it does not appear under what circumstances salt is carried from ports upon Lake Huron to Chicago and Milwaukee nor the cost of the transportation, it does appear that the salt produced at these Lake Huron ports moves mainly by water. The testimony shows that 80 per cent of all the salt manufactured in Michigan starts upon its journey by water, and it was said that 90 per cent of the salt going into this contested territory moved by lake and rail.

It can not, therefore, be doubted and must be assumed, that this Michigan salt can be laid down in Chicago or Milwaukee for $2\frac{1}{2}$ cents per 100 pounds. The cost of reaching any particular point of consumption can not exceed the rate from these two railroad centers plus $2\frac{1}{2}$ for the water carriage.

The distance from Chicago to St. Louis by the short line is 278 miles. Several different lines of railway connect these great commercial centers, and competition for business by these different routes is, and always has been, most active. It appears that the rate on salt from Chicago to East St. Louis was for a long time $6\frac{1}{2}$ cents per 100 pounds. The local rate on package salt is now 9 cents per 100 pounds, the rate on bulk salt the same.

Detroit is within the Michigan field. The quality of the salt produced at that point and the cost of production are substantially the same as at other points. The price at which that salt is sold can not exceed that obtained for salt produced at other Michigan plants. If Detroit salt is to find a market in St. Louis or upon the Mississippi River it must move there at no higher cost of

transportation than obtains from other Michigan producing points.

The Wabash Railroad has upon its rail at Detroit extensive salt works. If it is to move any part of the product of that factory to St. Louis or other Mississippi River points it must make a rate fairly commensurate with that from the plants of its competitors, and this is precisely what the Wabash Railroad has attempted to do in the past and is attempting to do to-day. It insists that just as the Kansas field is treated as an entirety in the naming of rates, so shall the Michigan field be treated, and that Detroit is a part of that field.

The cost of transporting salt from Ludington or Manistee to Chicago is $2\frac{1}{2}$ cents per 100 pounds; from Chicago to St. Louis, 9 cents per 100 pounds, making a total cost of $11\frac{1}{2}$ cents. The present rate from Detroit is $11\frac{1}{2}$ cents. It is difficult to see how the Wabash road can maintain a higher rate from Detroit than it now does in view of the competition which it meets from the Michigan field by other lines of transportation. Nor can it be said that the present rate from Chicago is an unnatural or an abnormal one. That rate, considering the general level of rates obtaining in the respective territories, is not much if any lower than the present rates from the Kansas field to Kansas City — not as low as the $13\frac{1}{2}$ -cent rate from that field to St. Louis.

Should the Wabash Railroad, under the circumstances of this case, be required to insist upon the maintenance of as low a rate from Hutchinson to St. Louis as it maintains from Detroit to St. Louis?

It may be questioned, to begin with, whether there is to-day any unreasonable disparity in the rates on package salt, which are $11\frac{1}{2}$ cents from Detroit as against $13\frac{1}{2}$ cents from Hutchinson.

While the rate from Detroit is less, although the distance is the same, it must be remembered that the general level of rates in the territory east of St. Louis is much lower than that in territory to the west. Indeed, this difference greatly exceeds the difference between these rates. For example, the first class rate from Hutchinson to St. Louis is \$1.19 $\frac{1}{2}$, while that from Detroit is 46 cents. In official classification salt is classified as sixth class, and the sixth class rate from Detroit to St. Louis is 14 cents. That commodity is not rated in the western classification, but the lowest rate named from Hutchinson to St. Louis upon any class is 22 cents.

It has been recently held in *Sunflower Glass Co. v. A., T & S. F. Ry. Co.*, 22 I. C. C. Rep., 391, that this difference in transportation

conditions may justify a lower commodity rate, mile for mile, east than west of the Mississippi River. On the whole, we are inclined to the opinion that the difference between these rates on package salt from the east and from the west is no greater than it ought to be under all the circumstances.

The proportional rate of 10 cents applies upon traffic destined for points beyond St. Louis. This Commission has in several instances held that a proportional rate applying to through traffic might well be lower than the corresponding local rate, and we do not find in this instance any undue disparity.

The rate of 9 cents upon bulk salt is the same as that from Chicago and is not therefore justified by competitive conditions. This rate gives to Detroit a distinct advantage over other points in the Michigan field and over the Kansas field, to which it is not entitled. In our opinion, a corresponding rate from the Kansas field of 11 cents, with a minimum of 60,000 pounds, would be relatively fair, and such a rate would afford better business for the carriers than the present package rate, minimum 37,500 pounds.

Our conclusion is that in the main rates from Detroit to St. Louis do not unduly discriminate against the Kansas producer, but assuming that they do, can the Wabash Railroad be properly required to correct that discrimination? We do not think that it should be, for the reason that this carrier does not bear such a relation to the rates from Hutchinson to St. Louis that it should be properly held responsible for whatever discrimination may exist in the present relation.

The Wabash takes up this traffic at Kansas City. It can only engage in the transportation from the Kansas field in connection with some line operating to Kansas City from the west. Were the Wabash disposed to reduce the rate from the Kansas field to St. Louis it could only do so by sacrificing its own revenue from Kansas City to St. Louis to a sufficient extent to bring about the desired readjustment. The present rate to the Missouri River from the Kansas field is 10 cents, and the Wabash must, therefore, if it establishes a rate of $11\frac{1}{2}$ cents to St. Louis, accept for its transportation service from Kansas City $1\frac{1}{2}$ cents per 100 pounds.

The distance from Kansas City and Chicago, respectively, to St. Louis is almost exactly the same. The cost of bringing salt from the Kansas field to Kansas City is 10 cents per 100 pounds; the cost of bringing salt from the Michigan field to Chicago is $2\frac{1}{2}$ cents per 100 pounds. How, in this posture, can the Wabash Railroad, extending from both Chicago and Kansas City to St. Louis, be re-

quired to maintain from Chicago and Kansas City such rates as will make the through rate from the point of production the same? To do this that carrier must name a rate from Kansas City which is $7\frac{1}{2}$ cents per 100 pounds less than from Chicago, although upon every consideration the Chicago rate should be the lower.

There is, in our opinion, undue discrimination upon the part of the Wabash Railroad in maintaining the present rate of 9 cents upon bulk salt. That rate, which is the same as the present rate from Chicago, is not forced by legitimate competition upon the carrier, and the Wabash Railroad should either join in establishing a corresponding rate from the Kansas field or should advance its rate from Detroit.

As to all other rates there is no undue discrimination, and if there were the Wabash could hardly be called upon to remove the same, since, except as to this bulk-salt rate, it simply accepts a situation which it can not control. There is no similarity between this case and that presented in *Railroad Commission of Tenn. v. A. A. R. R. Co.*, 17 I. C. C. Rep., 418, for there the lines beyond the Ohio River absolutely dominated the situation, and the discrimination could not exist except by their voluntary action.

It has already been noted that the average distance from the Kansas field to the upper Mississippi River crossings is greater than to St. Louis. Upon the other hand, the distance from the Michigan field grows less as we proceed north from St. Louis. If the Kansas field is not entitled to meet the Michigan field upon an equality of rate at St. Louis, it is still less entitled to do so at Mississippi River points north of St. Louis. For example, the distance from Hutchinson to Dubuque, the most northerly of these crossings in controversy, is 610 miles, while the distance from Chicago is but 172 miles. Rates from the Kansas field increase, as has been already noted, from $13\frac{1}{2}$ cents at St. Louis to 18 cents at Dubuque. Rates from the Michigan field are $13\frac{1}{2}$ cents to all Mississippi River crossings north of St. Louis. Manifestly, if there is no undue discrimination at St. Louis none exists at the more northerly crossings.

This complaint also puts in issue the justice of the present adjustment with respect to a great number of points west of the Mississippi River, mostly in the states of Iowa and Missouri.

The competitive situation embraced in the present proceeding was presented to the Commission in *Anthony Salt Co. v. M. P. Ry. Co.*, 5 I. C. C. Rep., 299, the Kansas shippers being in that case, as at the present time, the complainants. It is impossible to tell from

the report of that case exactly what the relation of rates complained of then was, but, clearly, it was much more favorable to Michigan than the present adjustment. The case shows, for example, that the rate from the Kansas field to St. Louis was $24\frac{1}{2}$ cents, while the rate from the Michigan field at that time was $10\frac{1}{2}$ cents. It seems fairly inferable from the statement of facts that under the then existing rates the Michigan producer met the Kansas producer upon a substantial equality at the Missouri River and had an advantage in the rate with respect to most territory east of that river.

While that complaint was dismissed, the controversy continued. Carriers serving the Kansas field were defendants to the proceeding and resisted the application of the complainants, but none the less it was and is manifestly in their interest to supply this territory between the Mississippi and Missouri rivers from Kansas. Kansas producers continued to insist upon a better rate, and rates were gradually reduced to all points. At St. Louis the cut was from $24\frac{1}{2}$ cents to $13\frac{1}{2}$ cents, at Fort Madison from $24\frac{1}{2}$ cents to 15 cents. There were also advances from Michigan. The whole situation was a most troublesome one, leading to many disputes and to many unfortunate rate situations from the standpoint of the carriers. Frequent conferences were held, until finally the matter was laid at rest by the present adjustment.

This case does not clearly show the exact theory upon which that adjustment has been worked out, nor does there seem to have been any exact theory. Probably, in view of the conflicting interests and the great number of carriers involved, it would be impossible to apply any uniform rule. Generally stated, rates from Michigan in all cases are less to the Mississippi River, as, in our opinion, they properly should be. Soon after crossing that river a point is reached where the rate from Michigan and from Kansas becomes the same, and this relation is continued west, producing a blanket of considerable extent, beyond which the rate is in favor of Kansas.

We have examined a great number of these intermediate points. as must be the case with every blanket, instances are found upon the edges where the present adjustment is not altogether in accordance with the relative distances and is not probably the adjustment which would be established if that point alone were under consideration. In the very nature of things it would be almost impossible for us to look into each instance, nor have we attempted to do so. The matter has been long the subject of controversy; the settlement seems to have been honestly made, and without undertaking to approve the adjustment in detail and without expressing an

opinion which would prevent a further examination of particular instances which may be called to our attention, we fail to find, on the whole, that this adjustment unduly discriminates against the interests of Kansas, which are represented by the complainants.

On the whole, we are satisfied that the present rates of freight are as favorable to the Kansas field as, all things considered, they should be, except that a rate applicable to the transportation of bulk salt from the Kansas field to St. Louis should be named to correspond with that established from Detroit.

The Wabash Railroad Company will be required to cease and desist from the discrimination now arising out of the maintenance from Detroit to St. Louis of the 9-cent rate upon bulk salt. Otherwise the complaint will be dismissed.

FOURTH SECTION APPLICATIONS.

It has been already noted that rates from the Kansas field to some points west of the Mississippi River are slightly higher than those at the river crossings, and it therefore results that in some instances there is a violation of the fourth section. This is referred to in the complaint and the intervening petitions.

The case was originally heard in the fall of 1910, but was not argued or disposed of at that time for the reason that the parties indicated a desire to make certain rate changes which it was thought might remove the cause of complaint. In fact, the rates from Detroit to St. Louis were advanced, as already indicated, but this was not sufficient to satisfy the complainants, and the case was accordingly set down for further hearing in November, 1911.

No reference was made upon the first hearing to the violations of the fourth section. It was the purpose of the Commission to set down for investigation upon the same date with the last hearing the applications which had been filed by the defendants to this proceeding for leave to maintain the higher intermediate charge, but through error, only the Wabash Railroad Company was notified.

Upon the hearing the examiner called attention to the fact that the fourth-section applications of the defendants should have been assigned and the defendants were given an opportunity to introduce any testimony upon that point which they desired. Some of them availed themselves of this opportunity, and the subject is referred to in more or less detail in all the briefs which have been filed and was to some extent discussed upon the argument. It was,

however, said by counsel for one or more of the defendants upon the argument that this matter ought not to be disposed of upon the present record, for the reason that other carriers not defendants to this proceeding were interested in these rates.

So far as appears the question presented under these fourth-section applications is an extremely simple one. Lines leading from Kansas in meeting competition upon the Mississippi River have made rates which they allege to be abnormally low, and for this reason they ask to maintain at intermediate points higher rates, which, they say, are reasonable. We have found that there is active competition upon the Mississippi River between these two salt fields and that the rates from both directions, especially from the Kansas field to these various Mississippi River crossings, are low, but we have not found, nor do we find, that they are so unreasonably low as to justify the charging of a higher rate at intermediate points.

Neither do we find that the competitive conditions which are alleged to justify the higher intermediate rates do, under all the circumstances of this case, afford such valid justification. Nor yet, while declining to condemn as unreasonable the intermediate rates, have we given to those rates such examination that we can pronounce them reasonable at this time.

Before we allow these defendants to depart from the mandate of the statute as expressed in the present fourth section we must be satisfied that the more distant rates are unduly low and that the departure from the fourth section is warranted by competitive conditions at the more distant point which do not exist at the intermediate point. In this case we fail to find that the long-distance rates are unreasonably low, and apparently the competition at the more distant point is of exactly the same sort as at the intermediate point.

If, therefore, these applications stood for disposition, we should deny the right to maintain the higher intermediate rates. So far as we can see, the facts are fully before the Commission, and nothing would be gained by another hearing; but if these defendants, or any of them, conceive that a further investigation should be held they may file with this Commission, on or before the 15th day of March, a statement asking for such further investigation and giving, briefly, the reasons why the present investigation has not been sufficient. If upon considering these statements ground for further investigation appears, the applications will be set down for hearing. Otherwise orders will be entered denying the applications as to these rates on salt, effective as of May 1, 1912.

UNION TANNING COMPANY *ET AL.* v. SOUTHERN
RAILWAY COMPANY *ET AL.*

26 I. C. C. 159 (1913).

Charles Conradis and Arthur B. Hayes for complainants.

Louis H. Porter and F. C. Taylor for complainant, Hans Rees' Sons.

R. Walton Moore for defendants.

REPORT OF THE COMMISSION.

CLEMENTS, *Commissioner*:

By tariffs effective during the last of September and first of October, 1910, the defendant carriers and others increased their carload rates on leather 2 cents per 100 pounds from practically all producing points in the southeastern states to New York and other eastern destinations, Virginia cities, and Buffalo-Pittsburgh territory, and to Ohio and Mississippi River crossings and other northern and western points. Thereupon complaint was filed by the United States Leather Company and others, alleging that the increased rates were unreasonable and asking that the same be condemned and that reparation be granted. There was also a general allegation that the rates in effect prior to the advance were themselves unjust and discriminatory, and violated Sections 1, 2, and 3 of the act to regulate commerce. In our report disposing of the case, the order in which was effective September 1, 1911, the general advance was condemned and reparation ordered on shipments to which the advanced rates had been applied, based upon the finding and conclusion that the carriers had failed to sustain the burden cast upon them by the act of 1910 of justifying the increased rates. *United States Leather Co. v. S. Ry. Co.*, 21 I. C. C., 323. The Commission declined, however, to pass upon the question of discrimination as between localities because of the lack of sufficient specification thereof in the petition; hence the present complaint, filed January 23, 1912, which more definitely alleges discrimination as between places and in addition unreasonableness of the present rates from the North Carolina points of shipment.

Complainants in the instant case are corporations engaged in the tanning and selling of leather and in the shipment thereof to various destinations. The southern tanneries of the Union Tanning Company are located at Middlesboro, Ky., Big Stone Gap, Va., Johnson

City and Chattanooga, Tenn., Flintstone, Ga., and Old Fort, N. C.; the other 7 complainants operate tanneries at Asheville, Morganton, Hazlewood, North Wilkesboro, Andrews, Rosman, and Sylva, N. C.

The discrimination alleged is with reference both to the rates to New York and other eastern destinations and to Chicago, Ill., Cincinnati, Ohio, and St. Louis, Mo. In the adjustment to New York the allegation is that the North Carolina points above stated and others are unjustly discriminated against, and those located at Bristol, Tenn.-Va., Big Stone Gap, Va., Middlesboro, Ky., Harriman, Watauga, Johnson City, Newport, Knoxville, and Chattanooga, Tenn., Flintstone and Rossville, Ga., and Decatur, Ala., unduly favored. Similar allegations are made with reference to the rates to Cincinnati, Chicago, and St. Louis, and in addition it is alleged that the rates to the two latter points unjustly discriminate against both the Tennessee and North Carolina tanneries in favor of Bristol.

The rates in issue and the mileages to the various destinations are substantially as follows:

From —	To —							
	New York.		Cincinnati.		Chicago.		St. Louis.	
	Rate.	Mileage.	Rate.	Mileage.	Rate.	Mileage.	Rate.	Mileage.
North Wilkesboro.	\$0.42	618	\$0.40	653	\$0.57	938	\$0.57	933
Hickory	.42	623	.40	492	.57	777	.57	772
Morganton	.42	644	.40	471	.57	756	.57	751
Marion	.42	665	.40	450	.57	735	.57	730
Old Fort	.42	676	.40	439	.57	724	.57	719
Asheville	.42	706	.35	409	.52	694	.52	689
Hazlewood	.44	736	.40	439	.57	724	.57	719
Sylva	.44	753	.40	456	.57	741	.57	736
Rosman	.44	754	.40	462	.57	747	.57	742
Andrews	.44	814	.40	517	.57	802	.57	797
Bristol	.32	642	.32	356	.36	641	.42	659
Watauga	.38	662	.35	391	.52	676	.52	671
Johnson City	.38	667	.35	386	.52	671	.52	666
Newport	.38	753	.35	344	.52	629	.52	624
Knoxville	.38	773	.30	291	.47	565	.49	560
Chattanooga	.38	884	.30	336	.47	596	.44	474
Flintstone	.38	892	.30	344	.47	604	.44	482
Rossville	.38	888	.30	340	.47	600	.44	478
Decatur	.38	1,006	.31	421	.44	566	.38	422
Walland	.42	799	.35	306	.52	591	.52	586
Harriman	.38	825	.25	256	.42	538	.40	508
Middlesboro	.38	774	.25	230	.42	515	.42	533
Big Stone Gap	.38	708	.25	290	.42	575	.42	593

The mileages shown to New York from the Tennessee tanneries are via the Bristol route. Statesville and Elkin, N. C., are also included in the list of North Carolina points, but no tanneries are located there and no commodity rates on leather are applicable therefrom.

In the adjustment of rates to New York the points in this territory are divided into three groups—the first extending from Decatur, Ala., to Watauga, Tenn., and including Chattanooga, Flintstone, Rossville, Knoxville, Newport, Johnson City, Harriman, Middlesboro, and Big Stone Gap; the second including Asheville, Old Fort, Marion, Morganton, Hickory, and North Wilkesboro, and taking a rate of 4 cents higher; and the third including Hazlewood, Sylva, and Andrews, on the Murphy Branch of the Southern, and Rosman, on the Lake Toxaway Branch, and taking a rate 6 cents higher than the first group. Walland is at the terminus of a branch of the Southern running south from Knoxville, and takes the same rate as the second group. The rate from Bristol is 32 cents. It will thus be noted that higher rates are applicable from North Carolina tanning points than from the more distant Tennessee points, and that leather from Tennessee moving via the Asheville route passes through higher-rated points.

To Cincinnati, Chicago, and St. Louis rates are made on what the chief witness for defendants terms “a more normal basis.” To Cincinnati, the least distant points, Harriman, Middlesboro, and Big Stone Gap, take the lowest rate; Chattanooga, Flintstone, Rossville, and Knoxville, 5 cents higher; Walland, Newport, Johnson City, Watauga, and Asheville, 10 cents higher; and the North Carolina points, except Asheville, 15 cents higher. Rates to Chicago and St. Louis are made by combination on Cincinnati, except from Decatur, from which point the combination is on Louisville. Decatur and Bristol take rates to Cincinnati of 31 and 32 cents, respectively, the latter being the fourth-class rate.

The first rate from this territory, 30 cents per 100 pounds from Chattanooga to New York, was established some time prior to 1887 and maintained until 1903, when there was a general advance of 5 cents in that and all other leather rates from southern tanneries, which had been made effective in the interim. In 1907 the carriers advanced the rates to New York and other eastern destinations 3 cents per 100 pounds. In that year, also, the carload minimum was increased from 20,000 to 24,000 pounds.

While, as above stated, the petition covers both the adjustment to New York, Cincinnati, Chicago, and St. Louis, complainants’

testimony and argument in briefs are directed mainly to the east-bound rates; and its contention of discrimination therein is based largely upon a comparison of distances and per-ton-mile earnings, pointed out in the exhibits and in the briefs, from Chattanooga and other points taking the same or lower rates with those from the North Carolina points. It is argued that the 38-cent rate from Chattanooga to New York is "an adjudicated basic rate" and as high as it reasonably might be, so that the alleged discrimination found by a comparison of the rates from the groups referred to not only shows unjust discrimination prejudicial to the North Carolina tanneries but that it can be removed only by reduction of the rates from the latter to or below the Chattanooga rate; in other words, that the alleged discrimination, if found by the Commission to be undue necessarily proves the rates from complaining points to be excessive and unreasonable.

At the hearing the chief witness for complainants, the traffic manager for the Union Tanning Company, said that in case the Commission found discrimination to exist they would prefer that the present situation be not disturbed rather than that the carriers be permitted to raise the Tennessee rates. To this, however, there was filed a protest by complainants, Hans Rees' Sons, this company having a tannery at Asheville, but none in Tennessee. They also protested against consideration of the westbound adjustment, alleging that they were not aware that complaint was to be made in reference thereto.

The defendants contend that none of the rates in question has been shown to be unreasonable or unduly discriminatory, but that if the Commission finds undue discrimination they should be permitted to remove same by increasing the rates from the Tennessee tanneries. They claim that the rate from Chattanooga to New York is abnormally low and should not be used as the measure of reasonableness of the rates from North Carolina tanneries; that the original rate was established as the result of agreement between the East Tennessee, Virginia & Georgia Railroad and tanning interests at Chattanooga; that rates from other tanning points were fixed with relation to Chattanooga and while those from North Carolina were affected they were never susceptible in the same degree to the influence which caused the very low rates from East Tennessee and were not made as low; and that the rates from North Carolina are themselves low as compared with rates on other southern products.

Defendants also claim that operating conditions via the Bristol

route from Chattanooga are more favorable than those from the North Carolina points, and that traffic over that portion of the Southern Railway between Chattanooga and Bristol is very much heavier than on the Western North Carolina lines of the same carrier. The Bristol route from Chattanooga to New York, via which the original rate was established, is 60 miles shorter than the Asheville route and lies more largely in trunk line territory.

Leather is a very valuable commodity, carloads ranging in value from \$7,500 to \$12,000. The value per ton is shown to be from \$380 to \$900, and the freight earnings per ton to New York from Johnson City, Middlesboro, Chattanooga, and Decatur, \$7.60; from Old Fort, \$8.40; Atlanta and Rome, \$9.60. Defendants submit for comparison rail earnings to New York and values per ton on cotton piece goods, lumber, and other commodities originating in the south, as follows:

Commodity.	Value per ton.	From —	Earnings per ton.
Lumber, yellow pine.....	\$30 to \$40	Johnson City and Chattanooga ..	\$5.70
Cast-iron pipe.....	24	Birmingham and Anniston	6.12
Bark, tanning extract, liquid...	60	Andrews, Newport, and Old Fort.	5.20
Cottonseed oil.....	126	{ Macon	6.00
Cottonseed meal, choice.....	30	{ Selma	6.20
Cotton piece goods	500 to 2,975	{ Atlanta and Memphis	5.80
		{ Atlanta.....	11.60
		{ Charlotte	9.80

The value of a commodity is one of the material considerations in the adjustment of rates, and it is just as unsound to say that rates upon carloads of equal tonnage and equal cost of movement, one of a low-grade, cheap commodity and the other of a high-grade and valuable commodity, should be made the same, except for the difference that might be allowed for the single time of increased risk, as it is to say that every commodity should be charged all it can stand or bear. It is alike in the public interest and just to the carriers, having regard to their entire business and their right to an opportunity to earn a fair return upon the property in addition to the cost of service, that in the adjustment of rates due weight be given to difference in values of the respective commodities carried and that such differences be not limited by the mere measure of difference in risk. Otherwise one of two results would of necessity follow: The rates as a whole would be such that it would be impossible for the carriers to earn what they reasonably might and,

in fact, what they of necessity should, in order to enable them to perform their services, or the rates on many low-grade commodities would have to be such that they would be prohibitory of any movement.

Bristol, Tenn.-Va., which complainants allege to be unduly favored both in the adjustment to New York and to the west, is the terminus of a branch of the Norfolk & Western Railway, which carrier has a line to Cincinnati and to Hagerstown, Md. Bristol is 657 miles from New York and 356 from Cincinnati; its rates are made on the trunk-line basis, being certain differentials over Virginia cities rates, and the Commission has held that they can not be made the measure of reasonableness of rates to points in the territory here involved. *Gump v. B. & O. R. R. Co.*, 14 I. C. C., 98; *Board of Trade of Morristown, Tenn., v. A. C. L. R. R. Co.*, 24 I. C. C., 372.

The average distance to Cincinnati from the North Carolina tanneries except Asheville, which takes a somewhat lower rate, is 487 miles and the yield per ton per mile is 16.7 mills. From the lower-rated points, including Bristol, the average distance is 336 miles and the per-ton-mile revenue 18.6 mills. The average per-ton-mile earnings from the North Carolina points are lower than from either Johnson City or Asheville, the points alleged to be unduly favored. As is evident from the statement of rates involved those to New York are not made with regard primarily to distance.

While in fixing reasonable rates and relative rate adjustments distance must always be considered as bearing both upon cost to the carrier in performing the service and the value of the service to the shipper, there are many other facts, such as density or sparsity of traffic over and along the lines of movement, comparative cost of construction and operation, and competitive conditions, which must be given weight. In some situations the other facts and conditions are so nearly uniform or similar that distance becomes the dominating factor in the relative adjustment of rates, while in others distance becomes, within limitations, a minor factor because of the dominating and controlling force of other facts and conditions; hence many striking inconsistencies would be apparent in different rate adjustments made by orders of this and state commissions, as well as voluntarily by the carriers, if examined and compared with regard to distance alone. If the Commission should dispose of these rate questions and controversies by resort alone or mainly to comparative distances, ton-mile-earnings, and estimated relative earnings above the estimated so-called "out-of-pocket"

cost to the carrier for each service performed, there could always be found standards for the reduction of every rate to the basis of the lowest, whatever may have compelled or induced its establishment. For the Commission to adopt such a course would inevitably lead to a continuous process of reducing the carriers' revenue, a result which would be detrimental to the public interest as well as unjust to the carriers.

Justice and reasonableness, demanded by the law and due alike to shippers and carriers and without which the public interest will not best be served, can only be secured by a careful consideration of all the facts, circumstances, and conditions which legitimately and practically bear upon the question before us. No inflexible, theoretical rule fixing the measure of weight to be given a comparison of distances or other facts, which vary in degree of importance in different cases, can conduce to the determination of the lawfulness of rates, which must be determined by their reasonableness, and the latter is ascertainable only as a question of fact by duly weighing all of the facts standing together in each case.

Upon the facts of the record we are not convinced that there is any undue discrimination in the adjustment of rates to Cincinnati, Chicago, or St. Louis, or that said rates are excessive or unreasonable. Further, we are not convinced that transportation conditions from the respective groups to New York are otherwise so similar that distance should be wholly controlling; that the North Carolina points enumerated are unjustly discriminated against, or that the present rates therefrom are excessive and unreasonable, in violation of section 1 of the act.

It follows that the complaint must be dismissed, and it will be so ordered.¹

¹ *Accord*, Board of Improvement, etc. v. St. Louis & San Francisco R. R. Co. *Et Al.* 26 I. C. C. 541. — *Ed.*

**IN RE INVESTIGATION OF ADVANCES IN RATES BY
CARRIERS IN WESTERN TRUNK LINE, TRANS-MIS-
SOURI, AND ILLINOIS FREIGHT COMMITTEE TERRI-
TORIES.**

20 I. C. C. 307 (1911).

Frank Lyon for the Interstate Commerce Commission.

Louis D. Brandeis for Boston Chamber of Commerce.

Clifford Thorne for American National Live Stock Association,
Corn Belt Meat Producers' Association, and others.

A. F. Stryker for South Omaha Live Stock Exchange.

John S. Dawson and *E. H. Hogueland* for Railroad Commission
of Kansas.

Haynie & Lust for Illinois Manufacturers' Association.

T. C. Spelling for Freight Payers' League.

S. H. Cowan for American National Live Stock Association and
others.

F. B. Montgomery and *John H. Atwood* for Shippers' Committee.

Francis B. James for National Industrial Traffic League &
Shippers' Association.

A. F. Verson, *R. H. Small*, and *P. W. Coyle* for St. Louis Busi-
ness Men's League.

Walter L. Fisher for National Dry Goods Association, Asso-
ciation of Western Shoe Wholesalers, and others.

Chester M. Dawes for Chicago, Burlington & Quincy Railroad
Company.

Walker D. Hines, *Robert Dunlap*, *T. J. Norton*, and *Gardiner
Lathrop* for Atchison, Topeka & Santa Fe Railway Company.

George W. SeEVERS and *S. G. Leets* for Minneapolis & St. Louis
Railroad Company and Iowa Central Railway Company.

Charles Donnelly for Northern Pacific Railway Company.

Burton Hanson and *William Ellis* for Chicago, Milwaukee &
St. Paul Railway Company.

W. S. Horton for Illinois Central Railroad Company.

N. S. Brown and *C. H. Stinson* for Wabash Railroad Company.

W. F. Dickinson and *E. B. Peirce* for Chicago, Rock Island &
Pacific Railway Company.

H. T. Ballard and *O. E. Butterfield* for Chicago, Indiana &
Southern Railway Company.

J. C. Jeffrey and *M. L. Clardy* for Missouri Pacific Railway
Company.

J. M. Bryson and J. W. Allen for Missouri, Kansas & Texas Railway Company, and Missouri, Kansas & Texas Railway Company of Texas.

J. B. Payne for Chicago Great Western Railroad Company.

J. B. Sheehan for Chicago, St. Paul, Minneapolis & Omaha Railway Company.

W. L. Martin for Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

F. H. Wood for St. Louis & San Francisco Railroad Company.

George Stuart Patterson for Pennsylvania Railroad Company.

S. A. Lynde, C. C. Wright, Edward M. Hyzer, and W. A. Gardner for Chicago & North Western Railway Company.

E. C. Lindley and J. D. Armstrong for Great Northern Railway Company.

L. H. Alexander and S. H. Strawn for Chicago & Alton Railroad Company.

REPORT OF THE COMMISSION.

LANE, *Commissioner*:

This proceeding, which is popularly known as the "Western Advanced Rate Case," involves the reasonableness of the rates upon some 200 commodities which the carriers west of Chicago have attempted to increase. No effort can be made to specify the individual rates, inasmuch as these number several hundred thousand, nor can the territory involved be precisely delimited, although a fair idea of its extent may be had by a survey of a map of the Burlington system which leads to most of the basing points upon which the rates concerned are fixed. More than 200 railroads operating in the states of Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas, and Montana are parties to these rates. It is needless to say that neither the carriers nor the shippers have throughout this investigation attempted to deal with all the specific rates between definite points of movement upon these lines of road. This investigation has been a general one, touching large and fundamental principles of law and governmental policy on the one hand, and of railroad needs, plans, and policies on the other.

The rates concerned are under voluntary suspension by act of the carriers. It will be recalled that in June, 1910, the principal carriers in Western Trunk Line territory filed with the Commission tariffs increasing their rates upon a number of important articles of commerce. This action was taken through common

agents. Before such rates, however, had gone into effect the Attorney General of the United States caused suit to be brought in the circuit court of the United States for the seventh circuit, alleging that such increased rates were the result of a combination and conspiracy in restraint of trade and in violation of the Sherman antitrust act. A temporary injunction having been secured, appeal was made by the carriers affected to the President of the United States, asking relief from such injunction and offering to voluntarily suspend the effectiveness of such rates pending a determination as to their reasonableness by the Interstate Commerce Commission. This appeal was made in view of a bill then pending before Congress amending the act to regulate commerce so as to vest in this Commission the power to suspend advanced rates. Such bill later became law. The carriers thereupon refiled their tariffs, suspending their effectiveness, however, until such time as the Commission could conduct the present investigation.

CONSTRUCTION OF NEW LAW.

At the threshold of this inquiry we are required to give interpretation to a new provision of the act to regulate commerce, which reads:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension may suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than one hundred and twenty days beyond the time when such rate, fare, charge, classification, regulation, or practice would otherwise go into effect, and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect,

the Commission may make such order in reference to such rate, fare, charge, classification, regulation, or practice as would be proper in a proceeding initiated after the rate, fare, charge, classification, regulation, or practice had become effective: *Provided*, That if any such hearing can not be concluded within the period of suspension, as above stated, the Interstate Commerce Commission may, in its discretion, extend the time of suspension for a further period not exceeding six months. At any hearing involving a rate increased after January first, nineteen hundred and ten, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

In the last sentence of this provision it is said that the burden of proof to show that "the increased rate" or proposed rate is just and reasonable shall be upon the common carrier. It is urged with much force and an extensive citation of authority that the purpose of this provision was to limit the investigation of the Commission to the consideration of the necessity for "the increase in the rate." The purpose of Congress, it is said, was to regard all rates in effect on January 1, 1901, as the maxima, which could not be increased until it was shown that there was reason and necessity for the specific increase made. This would limit our investigation as to all rates increased since that time to the simple question, What additional expenses have attached to the movement of these articles which make proper an increase in the rate?

Such a construction of the statute is suggested by decisions of the English courts in interpreting the railway and canal act of 1894. We think, however, it is clear from the language of that statute, as well as its history, that the purpose of Congress differed from the purpose of Parliament. The English law was based on a legislative conclusion that existing rates were already sufficiently high and should not be increased excepting as transportation costs increased. Therefore, the English commission was to deal with the increase itself in the rate and not with the increased rate. This distinction is fundamental in the consideration of the laws of the two Governments.

The British Parliament in 1891 and 1892 passed a series of public acts establishing the maximum rates and charges assessable

by the railway and canal companies of Great Britain and Ireland. These acts became effective upon December 31, 1892. On the day immediately following, viz., January 1, 1893, the carriers took advantage of the liberal scale of class rates provided for in these parliamentary acts, and advanced a great number of such rates which were lower than the maxima allowed and which had obtained for many years. The Railway and Canal Commission was without authority to check such increases and restore previously existing schedules. At once, therefore, it was perceived that the effect of the new legislation by Parliament under which relief had been hoped for by the shippers was to place it within the power of the carriers to increase all rates up to the high class rates fixed by parliamentary act.

It was to remedy this situation that the railway and canal traffic act of 1894 was passed providing that "where a railway company has either alone or jointly with any other railway company or companies since the last day of December, 1892, directly or indirectly increased, or hereafter increase, directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie upon the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an act of Parliament or by any provisional order confirmed by act of Parliament."

Lord Justice Smith gave the history of this act in the *Mansion House case*, 9 R. & C. T. Cases, p. 58, in these words:

"What the legislature did was obvious. We know how, when the new maxima came in, the companies put up their rates, and as regards many of them they put them up to their maxima, and it became a question for traders and the community at large, and the legislature said, when they found this had happened, we will go back two years and draw a line along there and say that is probably the proper rate two years ago, which they had been charging before they began putting up their rates to their maxima. We will just draw a line along there, and if they have increased them since that date, then we will put upon the railway company the onus of justifying that increase. That is the English of that act of Parliament, and that I have no doubt about."

The effect of this enactment was to cast upon the railway company the burden of proving "that the increase of the rate was reasonable." The act to regulate commerce, on the other hand, requires the carrier to show the reasonableness of the increased

rate. Under the act of Parliament, the carrier is called upon to justify the difference between its previously existing rate and the rate established, while under the act of Congress the carrier is called upon to prove that the new rate as a whole is reasonable. This distinction is clearly recognized in the opinion of Smith, *L. J.*, in the *Mansion House case*, 9 R. & C. T. Cases, at page 209, wherein it is said:

"There was an ingenious point taken by Mr. Russell, namely, that if the rate in the whole was reasonable, nothing more was to be inquired into. That really whittled the act of 1894 down to the procedure in vogue before 1894. The question then always was whether the rate or charge was reasonable, and this act, as I read it, makes the question whether the increase was fair and reasonable."

And, again, in the same case, Kay, *L. J.*, at page 201, says:

"That is where there has been an increase. If any complaint is made that the rate or charge is unreasonable it shall lie on the company to prove that the increase, not that the rate or charge, but that the increase of the rate or charge, is reasonable."

And on page 200:

"What the company is bound to prove is that the increase has been reasonable, and they do show that by merely showing that the present charge is reasonable."

There is, however, another and broader view by which we can determine the meaning of Congress. For more than 20 years Congress by express statutory declaration fixed the measure of a carrier's charge at "a just and reasonable rate." There was no check upon the initiative of the carrier. Any rate filed and published in accordance with the requirements of the law was presumed to be reasonable, and a direct proceeding of attack upon complaint was necessary to raise before this Commission the question whether or not it conformed to the standard set by the law. For a period of years the tendency of rates was downward, owing in great part to active competition between the carriers of the traffic. Rates were made from day to day, and as between one shipper and another, by means of rebates from the standard published rate. This led to extreme dissatisfaction on the part of the public, and to the serious injury of the roads themselves. To meet this situation the carriers attempted to form traffic associations by which under severe penalties they were bound to each other by contract to exact the published rates. Under decisions of the Supreme Court of the United States,

however, these alliances were declared unlawful, and there then followed the development of the "community of interest" plan by which, through the medium of one group of financiers or another, the carriers of a certain territory became harmonized. They no longer competed by cutting rates, because they were subject to a common control, or at least were dominated by interests that were sympathetic. There resulted an era of unexampled prosperity among the railroads as a whole. Net revenues increased, the stronger roads of higher credit absorbed the smaller; new lines were projected by the greater roads; small lines were articulated into large and connected systems; and with the development on the part of the carriers of the advantages of concord came an evident determination not only to make rates stable but if possible to bring about their increase. Accordingly, for several years past the chief body of protest coming from shippers to this Commission has been against increases in rates, and the Commission being unable to stay these increases, the shippers sought from Congress the enactment of a law by which the power would be given to this Commission, when public reasons made advisable such a course, to lay a restraining hand upon the power and initiative which hitherto had rested with the carrier without limitation or constraint.

Moreover, the Federal courts found themselves embarrassed by the appeals made to their equity powers against such increases. The courts differed upon the fundamental question of jurisdiction. In the cases where the courts assumed jurisdiction there resulted the greatest discrimination as between individual shippers and carriers, for as to some the increased rate was in effect, while as to others it was not in effect. With such a history before it Congress deemed it advisable to lodge with this Commission, which alone under the *Abilene case*, 204 U. S., 426, has power to determine the reasonableness of a rate, the power to restrain for a time an increased rate until a determination can be had as to whether this rate conforms to the requirement of the statute or is but the evidence of the exercise of an arbitrary power.

The National Legislature has not fixed, as in England, a body of maximum rates. It has not been declared that the rates of January 1, 1910, are to be regarded as either above or below the old and long established standard of reasonableness. The statute contains no intimation that we are to gauge an increased rate which is suspended by any other measure than that by which we would

gauge any existing rate that might be complained of. The power to suspend is ancillary to the general power of investigation, it being the mind of Congress that it was a healthier and wiser policy that there should be a reasonable exercise of such power of suspension than that either the courts should continue to inadequately deal by injunctive process with a problem the ultimate solution of which did not rest within their purview, or that the shipping public should be subjected to continuing instability of rates and consequent commercial disturbance. Moreover, the duty having been laid upon the carriers to fix reasonable rates, it was neither harsh nor oppressive to require them to make justification when such rates were to be increased.

Regarded from this point of view, we can not but conclude that Congress did not intend to say to this Commission: The rates obtaining on January 1, 1910, are maxima, and if a carrier attempts to increase them it must give the reason for the increase, showing what new burden of transportation expenses it has suffered which justifies such increase. The question before the Commission is that which would have arisen had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable. We may establish the rates proposed as reasonable, one or all of them, or reduce the proposed rates. We may continue in effect the present lower rates, or we may reduce the existing rates. For "the Commission may make such order in reference to such rate . . . as would be proper in a proceeding initiated after the rate had become effective." The purpose of Congress was to give this Commission the same plenary power over increased rates that since the enactment of the Hepburn Act it has enjoyed over other rates.

BURDEN OF PROOF.

Stress is further laid upon the use of the words "*the burden of proof* shall be upon the common carrier," and we are urged to a strict interpretation of this language along lines of judicial reasoning in civil and criminal cases. This language has a common-sense meaning which does not need elucidation by citation of authority.

It must be borne in mind that this Commission is not a court of law; its function is to apply the mandatory and restrictive provisions of the act to regulate commerce to stated conditions of fact. We must regard the problems presented to us from as

many standpoints as there are public interests involved. The making of a rate is in ultimate analysis the exercise of a taxing power on commerce. 73 Fed., 409. The reasonableness of a rate is to be determined by no mere mathematical calculation, though figures of cost and revenue must play a not inconsiderable part in arriving at a final judgment. Wise men may differ as to what a "just and reasonable rate" is under given conditions. The courts recognize that there is abundant play for what the present Chief Justice so admirably described as "the flexible limit of judgment which belongs to the power to make rates." 206 U. S., 26. The unrestricted power to make rates, however, should not rest in the hands of those whose tendency must be, by reason of human nature, to exact to the limit the highest return that can be procured. Reasons of public policy demand that there shall be a check placed upon a power which may be perverted and thus brought to restrict and embarrass commerce rather than increase and develop it. Every rate question, therefore, is a public question — this is the underlying principle of the act to regulate commerce and of all similar legislation controlling public utilities. An examination into the specific provisions of the act, especially into those of section 13, will make clear to the candid mind that a complaint before this Commission was not intended to be regarded in the same strict and hard light as a complaint in an action of law, but was to be regarded as an appeal to the Government against oppressive, unjust, and illegal action. A shipper may not dismiss his complaint without consent. The fact that he has no interest in the traffic concerned in his complaint does not "put him out of court." These and similar provisions indicate that the purpose of Congress in enacting the act to regulate commerce was to establish a body whose function it should be to protect the public interest and not merely regard the technical rights of an individual shipper, and in this view of the law the act has been administered by the Commission. In accepting this theory, therefore, it is not within belief that Congress intended by the language now under consideration to convert this Commission into a tribunal which should merely determine as between two sides the preponderance of evidence and base its decisions upon technical and somewhat archaic rules of evidence.

By this, however, we are not to be understood as meaning that the language of the act is without significance, or has no binding authority upon us, or that it casts no burden upon the carriers. The assumption of the law is that the railroad which

increases its rates takes such action knowing that the law casts upon it—if challenge is made either by this Commission or otherwise—the burden of justifying its action. Theirs, in the language of the learned Dean Wigmore, is “the risk of nonpersuasion.” *Wigmore on Evidence*, sec. 2485. The railroad must assume to prove to this Commission that the new and the increased rates are within the words of description and limitation used in the act; that is, that they are just and reasonable. And to say that they must prove this is to say that they must satisfy our minds of this fact. . . .¹

NEW YORK STATE SHIPPERS' PROTECTIVE ASSOCIATION v. NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *ET AL.*

30 I. C. C. 437 (1914).

Milton E. Gibbs for complainant.

Ernest S. Ballard for New York Central & Hudson River Railroad Company.

Henry Wolf Bickel for Pennsylvania Railroad Company.

Theo. H. Burgess for Erie Railroad Company.

John L. Seager for Delaware, Lackawanna & Western Railroad Company.

Stewart C. Pratt for Lehigh Valley Railroad Company.

REPORT OF THE COMMISSION.

McCHORD, *Commissioner*:

This case brings in issue the lawfulness of the regulations and practices of railroads in western New York with respect to car fittings used in connection with shipments in bulk of grain, potatoes, and other produce. Complainant is an incorporated association having a membership of about 65 firms and individual

¹ The carrier's burden in justifying an increased rate is not sustained by the fact that no traffic moves under the old joint rate, *Advances in Rates on Cottonseed*, 26 I. C. C. 211, nor that the increase is due to a disagreement of connecting carriers as to divisions, *Switching at Arcade*, 30 I. C. C. 501, nor that the increase was intended to remove existing rate maladjustments if there are resulting new inequalities. *Lumber to Nashville (Tenn.)*, 31 I. C. C. 186.—Ed.

shippers and has its main office in Rochester, N. Y. Its members ship grain, potatoes, cabbage, apples, onions, carrots, and other produce, from various points of origin in the western part of the state of New York, to Boston, New York City, Philadelphia, Baltimore, Pittsburgh, and points taking the same rates.

In substance it is asserted that it is the carrier's duty to supply cars at all seasons of the year fully equipped for the safe transportation of grain, potatoes, and other produce in bulk without further fitting; or, that if a car be tendered the shipper which can not safely be used for such commodities, in view of their nature or of the condition of the weather, it is the carrier's duty to furnish, or to pay for, all materials and labor necessary to render the car reasonably safe. The particular matters to which complainant directs attention are the rules and practices of the defendants with respect to grain doors, bulkheads, and car linings.

For loading certain commodities in bulk, grain doors and bulkheads are used at all times of the year, the former to retain the load in the car and to prevent leakage therefrom, and the latter to divide the car into two bins, one at either end, and a free space from door to door between the bins. Car linings serve other purposes, which will be pointed out later.

The rules and practices of these defendants concerning grain doors are not identical in all details, but the rules of one carrier do not differ in any material respect from those of another, nor from the rules generally in force throughout the country. The carriers supply grain doors, or reimburse the shipper for their actual cost, not exceeding \$2 per car, when furnished by him. Inside or extra doors have been furnished to shippers of grain for about 35 years; their cost is practically the same in all cases; there were special reasons which induced the railroads to furnish them; and the presumption is that rates are maintained with respect thereto. *National Lumber Dealers Assn. v. A. C. L. R. R. Co.*, 14 I. C. C., 154, 163. Although it is contended here that \$2 per car is not fully compensatory to the shipper when doors are furnished by him, we see no reason on this record to require a change in the rules or practices of the defendants, or to uproot a general practice of long standing that is not inequitable. There is no undue burden borne by these New York shippers of grain, and no reason has been shown why they should receive advantages not extended to grain shippers in other sections of the country.

Bulkheads are temporary barriers of boards and extend across

the interior of the car on either side of the door openings. They convert the car into bins, one at either end, with a free space between the bins from door to door. The height to which they are built varies, and the complainant contends that the shipper is seldom, if ever, reimbursed for the expense of constructing them. Defendants' tariffs with respect to bulkheads differ in minor details, but they all agree in making \$2 the maximum allowance. Apparently providing bulkheads, or making an allowance therefor when furnished by the shipper, is a practice that is comparatively recent and was entered into by these defendants for intrastate shipments in obedience to state authority; afterwards it spread to interstate shipments. This practice is not so widely extended throughout the country as is that of supplying inside doors for grain shipments; and to the extent the practice is not general, New York shippers are preferred and have an advantage over other shippers of produce in bulk. Nothing in the present record is persuasive that the rules and practices of defendants in regard to bulkheads are unreasonable or subject these shippers to undue disadvantage.

For the protection in winter of perishable bulk produce, shippers in western New York furnish all cars with linings and heat the air in the cars prior to forwarding.

Potatoes move largely in winter and the facts connected with their loading, protection from frost, and transportation were presented by the parties as typical of those pertaining to perishable produce generally. Frost protection that is sufficient for potatoes in bulk is ample for bulk shipments of apples, onions, and carrots, and is more than is needed for cabbage. These commodities move safely in bulk in ordinary box, or even stock cars, without special weather protection, except during the colder months of the year, from November to April. During the winter the defendants furnish refrigerator or produce cars for such shipments, as the best types of equipment owned by them, and occasionally a box car is lined by the shipper and used by him during the season. At all times, and whatever type of equipment be used, the shipper fits the car for loading in bulk by constructing bulkheads. This facilitates loading and unloading and provides in winter a free space for the stove between the doors. The stove does not remain in refrigerator or produce cars during transportation; it is removed as soon as the air in the car has been thoroughly heated; the car is sealed and sent on its way without special attendance. When box cars are used, which

seldom happens in western New York, the stove remains in the car and an attendant is necessary.

The rates on these commodities are not in issue; they are the same throughout the year and apply to shipments in bulk or in packages. No extra charge is made by these defendants for the use of produce or refrigerator cars in winter, and allowances for the weights of linings are made. The allowance made by the official classification is 1,000 pounds per car. By exceptions to this rule, some of the defendants increase the weight allowed for linings; however, these increases are not material, as the testimony indicates that the linings used by these shippers in produce and refrigerator cars average about 1,000 pounds, and box cars, which would require heavier linings, are seldom or never used.

The methods of providing extra frost protection in produce and refrigerator cars used by these shippers differ, but the general practice is to build a temporary floor at each end of the car, raised enough above the permanent floor to provide a space for the circulation of air. These temporary floors extend only to the bulkheads and are covered with insulating paper, which is continued up the sides of the car to the height of the load. The ice boxes and ventilators at the end of the car are boarded over. A refrigerator or produce car so lined and heated will protect the shipment from frost for four or five days, even in zero weather.

The cost of lining refrigerator and produce cars in the manner described varies from \$11 to \$15 per car, and we may assume that a fair average of these expenses would be about \$13. Complainant claims that the carriers should furnish cars so fitted for the transportation in bulk of the commodities named that no additional fittings would be required and no linings needed for protection from frost. Defendants claim, on the other hand, that their rates are the same throughout the year, and apply on these articles in packages or in bulk; that if the shippers would use packages, no bulkheads or linings would be necessary; and that having furnished the most suitable equipment owned by them, any additional fittings needed to adapt the cars for special service should be at the expense of the shipper.

Western New York shippers, at points of destination, compete with shippers of potatoes from Maine, Michigan, Wisconsin, and Minnesota. Shipments from Maine move in Eastman heater cars and pay charges for heater service, in addition to the rates for transportation, that amount to \$14.40 per car for 400 miles and \$25.20 per car for 700 miles. *Boston Potato Receivers' Asso.*

v. *B. & A. R. R. Co.*, 25 I. C. C., 159. In winter, shippers of potatoes from points in Minnesota and Wisconsin to Chicago and other points may elect between a protected service, in special equipment at the risk of the carrier for weather damages, or at a lower rate and at their own risk may furnish their own protection. *Protection of Potato Shipments in Winter*, 26 I. C. C., 681, and 29 I. C. C., 504. The record before us sets forth a shipment of potatoes in bulk from Batavia, N. Y., to Rockaway, N. J., which moved in December, 1913. The shipment weighed between 30,000 and 31,000 pounds, the rate was 15 cents per 100 pounds, the total charges slightly over \$45, and it moved in an unlined refrigerator car, presumably without damage. The distance from Batavia to Rockaway is about 370 miles and the rate charged yielded a revenue slightly over 8 mills per ton per mile. If the car had been lined the cost of this protection to the shipment would have been about \$12.25, and it is complainant's contention that such expense should be placed upon the carrier. It would seem, however, that shippers from western New York are not subjected to greater total expense for moving potatoes in winter than is borne by shippers from Maine and they are at least upon an equal footing with shippers from Minnesota and Wisconsin.

In what is known as the *Precooling case* the Supreme Court has recently passed upon the subject of car fittings. *A., T. & S. F. Ry. Co. v. United States*, 232 U. S., 199. The court said:

"As a general rule, the carrier loads all freight tendered in less-than-carload lots while the consignor loads in all cases where, for his convenience, the car is placed at his warehouse or on public team tracks. . . .

"But loading may involve more than the mere placing of the freight on the car, since the character of the shipment may be such as to require the furnishing and placing of stakes, racks, blocks, and binders needed to make the transportation safe; or, the freight may be such as to require special covering, packing, icing, or heating, in order to preserve the merchandise in condition fit for use at the end of the journey. Who is to furnish these needed facilities may be quite as uncertain as who is to place the freight on the car, and can only be determined by considering the character of the shipment, the place where the loading begins, and who can most economically perform the service required.

"Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers

and carriers — their rights in turn having been adjusted by a reduction in the rate if the loading is done in whole or in part by the shipper, and by an increase in the rate where the loading is done in whole or in part by the carrier. But, by whomsoever done, the loading must be such as to fit the freight for shipment."

In the last analysis sound economics and valid law coincide. Neither the shipper nor the carrier can insist upon a wasteful or expensive service for which the consumer must ultimately pay. At present these shippers are provided in wintertime, without extra charge, with produce or refrigerator cars, and the rates are the same throughout the year. They admit that if the carrier furnished heater cars they would have to bear the additional expense for the extra service, but this record does not show how much that would be, as these defendants have no heater cars. However, if we compare the charges for heater service approved in *Boston Potato Receivers' Asso. case, supra*, with the cost of lining the cars, as shown here, it appears that the ultimate expense to the public is somewhat less from western New York shipping points than from points in Maine. This comparison is not vitiated by the fact that the New York shipper thoroughly heats the car before sealing it, as described above, for the cost of this heating can not be very great, and must be less than the expense of continuous heating and personal attendance that shippers from other sections bear.

Many cases involving the question whether the carrier or the shipper should bear the expense of car fittings have been submitted to us. The summary of our conclusions given in *Southwestern Missouri Millers' Club v. St. L. & S. F. R. R. Co.*, 26 I. C. C., 245, 251, was as follows:

"Generally, when it is necessary to secure upon the car freight which the shipper loads, it is the duty of the shipper to provide the necessary material and to do the work. This applies to machinery and other articles which must be fastened to the floor of the car or in some other way secured in the car to prevent lurching from side to side. Where special preparation is required to fit the car for the shipment of a particular commodity, the task of a special preparation ordinarily devolves upon the shipper, and the reason for this is that the shipper can, as a rule, in case of carload freight where the loading is done by him and where the car is put into his possession for that purpose, perform this work most economically and to better advantage than the carrier."

It is not necessary to pursue this subject further or to take up

in detail the various minor contentions of the parties to this case. It appears that improved cars are coming into use provided with grooves on either side of the doorway in which boards may be placed to form bulkheads, and that some of the defendants now furnish refrigerator cars equipped with racks or false sectional floorings, which supply nearly all the winter requirements of these shippers. At the present time shippers frequently nail their bulkheads and false floorings to the car, even though the tariffs forbid them so to use refrigerator and produce cars. Every nail that is driven into these cars punctures the insulating materials, upon the integrity of which their usefulness depends. It would seem that the shippers and carriers should cooperate in the use and maintenance of such equipment, the carriers by providing dead pieces into which nails may be driven without injuring the car and the shippers by placing nails only where they can be used without injury to the insulation.

The complaint should be dismissed, and it will be so ordered.

KAUFMAN COMMERCIAL CLUB *v.* TEXAS & NEW
ORLEANS RAILROAD COMPANY *ET AL.*

31 I. C. C. 167 (1914).

S. H. Cowan and *P. H. Dismukes* for complainant.

J. R. Christian for Sunset Central lines.

Thomas Bond for St. Louis & San Francisco Railroad Company;

A. C. Fonda for Gulf, Colorado & Santa Fe Railway Company; Atchison, Topeka & Santa Fe Railway Company; and St. Louis, San Francisco & Texas Railway Company.

W. F. Dickinson and *R. M. Rowland* for Chicago, Rock Island & Pacific Railway Company and Chicago, Rock Island & Gulf Railway Company.

A. A. Hurd for Atchison, Topeka & Santa Fe Railway Company and Gulf, Colorado & Santa Fe Railway Company.

P. H. Welborne for St. Louis, San Francisco & Texas Railway Company.

C. S. Burg and *J. F. Garvin* for Missouri, Kansas & Texas Railway Company of Texas and Missouri, Kansas & Texas Railway Company.

REPORT OF THE COMMISSION.

DANIELS, *Commissioner*:

Complainant is a voluntary business association of Kaufman, Tex., composed of merchants and dealers engaged in various lines of business at that place. The rates complained of are those applied to shipments of grain and grain products from the states of Kansas and Oklahoma to Kaufman, it being alleged that such rates are unjust, unreasonable, and unduly discriminatory, in violation of sections 1 and 3 of the act to regulate commerce. The method of making rates on the commodities named from the wheat-producing sections of Oklahoma and the states north thereof by dividing the state of Texas into groups was described by this Commission in *Mitchell v. A., T. & S. F. Ry. Co.*, 12 I. C. C., 324, and *Farmers, Merchants & Shippers Club of Kansas v. A., T. & S. F. Ry. Co.*, 12 I. C. C., 351, 364, 365, and 366, and it is not necessary to repeat here this general description. It is the application of this system of group rates to the particular facts and conditions existing on this record with which we are here concerned.

Kaufman, with a population of 3,000, is the county seat of Kaufman county, Tex. Terrell, with a population between 7,000 and 8,000, is situated in the same county, 10 miles north. Dallas is situated 26 miles west and slightly north of Kaufman. From Oklahoma points Dallas is in group A and from points north of Oklahoma, Dallas and Terrell are located in group 1 of the Texas grain and grain products groups. Kaufman is in group 2 for grain rates and in group 3 for rates on flour and other grain products. Using the distance from the producing points from which grain and grain products mostly move to Kaufman and Terrell, it is found that the average distance to Kaufman exceeds the average distance to Terrell by less than 6 miles. On flour and other grains product Terrell has rates lower by 5 cents and on wheat, corn, and oats lower by $2\frac{1}{2}$ cents than the rates on the same commodities to Kaufman. Dallas has the same rates as Terrell, except from points in Oklahoma, from which the Dallas rates on flour, corn, and oats are $3\frac{1}{2}$ cents and on wheat 3 cents less than the rates to Terrell. Taking the rates and distances from representative points in Kansas, the distance to Terrell exceeds the distance to Kaufman by approximately 1 per cent, while Kaufman's rates on grain products exceed those of Terrell by 14 per cent and on wheat the percentage of the excess against Kaufman is $7\frac{1}{2}$. Another comparison made by a witness

for complainant was the proportional rates to Shreveport compared with such rates to Kaufman. From Kansas City to Shreveport, according to the testimony, the rates are, on wheat and flour 24 cents, corn 21 cents, the distance being 633 miles. From Kansas City to Kaufman, the rate on wheat is 28½ cents, flour 33½ cents, and corn 25 cents, the distance being 545 miles. The rates in cents per 100 pounds as shown by tariffs on file with the Commission from Kansas City proper are:

To	Flour.	Corn and oats.	Wheat.
Kaufman	40½	30	33
Shreveport	29	25	29

Rates on bacon, lard, packing-house products, agricultural implements, furniture, and other classes and commodities are the same to Kaufman from Kansas City as they are to Terrell. Athens and Jacksonville, south and east of Kaufman on the line of the Texas & New Orleans Railroad and from 40 to 75 miles farther from the grain fields, are in grain products group No. 2 and therefore enjoy rates on such products 2½ cents per 100 pounds less than Kaufman, though the movement is on the same line through Kaufman. While this violation of the fourth section of the act is protected by an application under that section and is not alleged in the complaint, the fact that these lower rates for a longer haul are maintained may properly be considered. With Kaufman put in a lower group than the longer distance points there will be avoided this violation of the fourth section. Wills Point east and Forney west of Terrell, small towns on the Texas & Pacific Railway in competition with Kaufman, enjoy group-1 rates on both grain and grain products.

The right existing at Dallas and Terrell to reship at the balance of the through rate emphasizes the rate advantages that these markets have over Kaufman.

Kaufman is served by two railroads, the Texas & New Orleans Railroad Company and the Texas Midland Railroad. Terrell likewise has two railroads, the Texas & Pacific Railway Company and the Texas Midland Railroad, the latter of which expresses of record a willingness that the relation of rates asked by Kaufman should be granted.

Of the shipments shown by the record to have been made to

Kaufman during twelve months, there were 188 carloads of flour and other grain products and 77 carloads of corn. Apparently there were no shipments of wheat.

Merchants and business men at Kaufman, testifying at the hearing, said that farmers living in Kaufman county nearer to Kaufman than to Terrell would buy at Terrell because they could get lower prices on grain and grain products, especially flour, and having gone to Terrell to make such purchases, they would buy any other commodities needed.

The defendants do not contend that the rates to Dallas and Terrell and the other points with which comparisons were made are unreasonably low, but they seek to justify the relation of rates complained of by saying that the group system has long existed, and that to grant relief to Kaufman would disarrange the present boundaries between the different groups and create boundaries "for which no logical justification could be offered." The reason advanced for placing Terrell and Kaufman in different groups was that formerly, when group boundaries were being fixed, rates, on these commodities into Texas were made on the low proportional rate to Texarkana added to the state local rate into Texas; that under the Texas scale there being a two-line haul from Texarkana to Kaufman and a one-line haul to Terrell, the rate to Kaufman was made higher. Whether or not this explanation describes the origin of these rates, the present basis is the grouping system, and this basis is what we here have to consider.

Moreover, whatever influenced the carriers originally in making the particular boundaries of the different groups, the fact now is that the rates on grain and grain products are not determined by shipments through Texarkana, and the defendants here admit that group 2 should be enlarged and given rates somewhat higher than present group-2 rates and somewhat lower than group-3 rates. The defendants, therefore, while defending the group system as a system, admit that there exists a warrant for improving it. To put Kaufman in different groups for grain and grain products is illogical and artificial; and the delimited area and wholly anomalous geographical isolation of group 2 indicates that it is an arrangement that has survived whatever real usefulness it may once have had.

In *Farmers, Merchants & Shippers Club v. A., T. & S. F. Ry. Co.*, *supra*, without objection from the defendants, Lancaster, a small town 10 miles south of Dallas, was transferred from group

2 to group 1. In *Mitchell v. A., T. & S. F. Ry. Co.*, *supra*, we referred to the fact that we had in the *Farmers, etc., Club case*, *supra*, upon the request of both complainants and defendants, decided not to disturb this group system of rate making, and said:

"It is evident that every system of group rates must occasion more or less discrimination. The rate to the nearer edge of the group as compared with the more distant edge is of necessity discriminatory. This discrimination grows relatively more in proportion as the distance from the group decreases, and plainly there must come a point when the point of origin is so near the group that the discrimination will become undue."

This principle has been stated and referred to in other cases, among which see *Alpha Portland Cement Co. v. B. & O. R. R. Co.*, 22 I. C. C., 446 and 449; *Hammerschmidt & Franzen Co. v. C. & N. W. Ry. Co.*, 30 I. C. C., 71, 81.

That tangible injury results to the merchants, business men and consumers of Kaufman represented by the complainant here, can not be denied. There is no natural boundary line between Kaufman and Terrell which would justify placing these towns in different rate-making groups.

It is argued that to grant relief here may make it necessary to further enlarge the boundaries of group 1 so as to include other towns such as Waxahachie and Ennis. It appears that there is a natural boundary line, a river, between Kaufman and these towns, and that there is not now any competition between them, but the relation between these towns and Kaufman is not now before us. There are here no sufficient facts to authorize a determination of the general questions that may be involved in the Texas grain and grain products rate-making groups, or to decide whether or not the groups should be broken up and rates made having some reasonable relation to the total distance involved. This is a question not presented at this time, and it is unnecessary on this record for us either to approve or to disapprove of this special system of basing rates on groups. It is not necessary, nor is the record sufficiently full, for us to express any opinion regarding any method for a general change in the system.

There is here shown a rate situation where the point of destination "is so near the group that the discrimination" is undue, and this is the specific question that we must determine. The argument that other localities may now or hereafter be sub-

jected to the same discrimination as that here shown is an argument of inconvenience, and one that overlooks the prohibition of the law against all "unreasonable preference or advantage" and the mandate of the law that "the Commission is hereby authorized and *required* to execute and enforce the provisions of this act."

In *Corporation Commission, North Carolina, v. N. & W. Ry. Co.*, 19 I. C. C., 303, 309, the argument here advanced was urged, and we said:

"It is argued by the defendants that rates to Carolina territory from the points in question are made on the zone system, and that any reduction of rates to Winston-Salem and Durham would affect and disturb rates to a number of points in a wide extent of territory. Because defendants have constructed a system of rates on a zone or blanket system is not reason sufficient, in our judgment, to justify the collection of unreasonable charges to any point."

In *Kansas v. A., T. & S. F. Ry. Co.*, 27 I. C. C., 673, 688, we said:

"The shippers of Kansas in general, whether *jobbers*, *retailers*, or direct *consumers*, are entitled to rates *comparatively* reasonable . . . with the rates of their competitors to the extent of the similarity in transportation conditions."

In the *Shreveport case, Houston E. & W. Texas Ry. Co. v. U. S.*, decided June 8, 1914, but not yet reported, the Supreme Court of the United States as illustrating and emphasizing the sweeping prohibition against undue discrimination said: "It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at," and the court then quotes from the report of the Senate Committee on Interstate Commerce the following:

"The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations. [Senate Report No. 46, 49th Cong., 1st Sess., p. 219.]"

A just equality of opportunity for shipper and locality is required by the law. That discrimination had long existed without correction did not justify the discrimination, but furnished a reason why the law which we are "required to execute and enforce" was passed.

Upon a careful consideration of the record we determine and find that the rates on grain and grain products now maintained to Kaufman are unduly prejudicial and unlawful and that defendants should be required to establish from the points of origin on their lines in the states of Kansas and Oklahoma to Kaufman rates on the commodities therein named not in excess of those contemporaneously applying from such points of origin to Terrell, Tex. An order conforming to these conclusions will be entered.¹

BLANTON W. BURFORD *ET AL.* *v.* LOUISVILLE &
NASHVILLE RAILROAD COMPANY *ET AL.*

31 I. C. C. 182 (1914).

Blanton W. Burford, James A. Horn, and James W. Hamilton
for complainants in person.

W. A. Northcutt for Louisville & Nashville Railroad Company.

Claude Waller for Nashville, Chattanooga & St. Louis Railway.

Thomas W. White and S. W. Fordyce for Tennessee Central
Railroad Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

The three complainants in this case are proprietors, respectively, of hotels located at or near the following points in Tennessee on the line of the Tennessee Central Railroad Company: Bloomington, about 84 miles east of Nashville, Tenn.; Horn Springs, about 27 miles east of Nashville; and Hamilton Springs, about one-half mile from Horn Springs.

By complaint, filed May 20, 1912, it is alleged that defendants Louisville & Nashville Railroad Company and Nashville, Chattanooga & St. Louis Railway unjustly discriminate against the complainants in that they refuse to join with defendant Tennessee Central Railroad Company in the establishment of through routes and joint interstate passenger fares to the points named,

¹ Compare *Stock and Sons v. Lake Shore & Michigan Southern R. R. Co.*, 31 I. C. C. 150, as illustrative of cases in which differentiation does not constitute unlawful discrimination. — Ed.

although they are parties to such routes and fares to points on the Southern, Illinois Central, and other railways at or near which similar resorts are located.

The hotel at Horn Springs is open during the entire year; those at the other points only during the summer months. The resort near Bloomington is capable of accommodating about 125 guests at one time. During the summer of 1912 its total guests numbered 614. The capacity of the Horn Springs hotel is about 160 guests, and the average yearly attendance for the past three years has been from 2,500 to 3,000. No evidence was offered as to the capacity of the Hamilton Springs resort.

The Tennessee Central runs southeast from Hopkinsville, Ky., to Nashville, Tenn., thence east to Harriman, Tenn. It connects with the Illinois Central at Hopkinsville, with the Cincinnati, New Orleans & Texas Pacific Railway at Emory Gap, Tenn., and with the Southern Railway at Harriman. Through tickets are sold from points on these connecting lines to the points here involved. The passenger station of the Tennessee Central and the joint passenger station of the other defendants at Nashville are about seven-eighths of a mile apart.

The Nashville, Chattanooga & St. Louis Railway has a branch line paralleling the Tennessee Central for a distance of 31 miles, from Nashville to Lebanon, Tenn., which latter point is 5 miles from Horn Springs and 54 miles from Bloomington, and also a line extending from Nashville to Chattanooga, Tenn., which competes with the Tennessee Central for traffic to eastern points.

There is no arrangement for through routes and joint passenger fares between points on the Louisville & Nashville or Nashville, Chattanooga & St. Louis and points on the Tennessee Central; consequently it is necessary for passengers traveling to complainants' resorts to purchase tickets and check their baggage to Nashville and there to purchase other tickets and recheck their baggage to destination. This, complainants contend, results in great inconvenience to their patrons and loss of business to themselves. Complainants are desirous of the establishment to their resorts of round-trip excursion fares on the same basis as is in effect to resorts in this section on other lines.

The principal defendants admit that they participate in through routes and joint fares from points on their lines to resorts on the lines of the Southern, Illinois Central, and other carriers, but deny that their refusal to make the arrangements asked with the Tennessee Central amounts to undue discrimination against

complainants. The Tennessee Central is desirous of the establishment of through-ticketing arrangements to complainants' resorts and in the past has made efforts to that end.

It is contended that traffic conditions with respect to the Southern and Illinois Central railroads are different from those on the Tennessee Central, for the reason that the former two lines have many hundred miles of track reaching in various directions and touching many large commercial centers, while the principal defendants have a large number of important tourist resorts on their own lines to which they desire through arrangements from points on the Southern and Illinois Central, and in order to secure and maintain such arrangements it is necessary for them to join in similar arrangements from points on their lines to resorts on the lines of these connections. It was further contended that the traveling public is not seriously inconvenienced through lack of interchange arrangements at Nashville.

As stated, the station of the Tennessee Central and the joint station of the other defendants at Nashville are about seven-eighths of a mile apart; and if baggage were to be checked through to the destinations involved it would be necessary to have it drayed between stations. At the hearing it was stated, however, that the refusal of the principal defendants to establish through routes and joint fares is not based on the necessity for such transfer, but upon the fact that they do not consider that the establishment of such routes and fares would be of advantage to them, as it is claimed that the number of passengers traveling to summer resorts on the Tennessee Central is very small. It appears that the two lines named have arrangements for the transfer of passengers and baggage between stations in connection with through transportation to resorts on the Southern and Illinois Central at several points, namely, between the Nashville, Chattanooga & St. Louis and the Southern at Chattanooga, Tenn., and Atlanta, Ga., and between the Louisville & Nashville and Illinois Central at Louisville, Ky., and Birmingham, Ala. Except in cases where competition necessitates absorption, the general practice appears to be to add to the through fare a reasonable amount to cover the transfer of passenger and baggage.

There is already considerable travel to and from complainants' resorts, and evidently there would be more were it not for the refusal of the principal defendants to join with the Tennessee Central in arrangements for through routes and joint fares. The contention that complainants do not pay the fares of their patrons

and are therefore not directly damaged finds its answer in the provision of section 13 of the act to regulate commerce that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Upon the facts and circumstances of record, we are of opinion and find that the refusal of the Louisville & Nashville and Nashville, Chattanooga & St. Louis to join with the Tennessee Central in arrangements for through routes and joint interstate passenger fares to and from points at or near which complainants' resorts are located, while contemporaneously participating in the maintenance of such routes and fares to and from resorts in this section on other lines, subjects complainants and the traveling public to undue prejudice and disadvantage. An order will be entered requiring defendants to establish through routes and joint passenger fares as sought by complainants.

MINIMUM WEIGHT ON FRESH MEATS AND OTHER COMMODITIES.

30 I. C. C. 349 (1914).

E. W. Skipworth for Sulzberger & Sons Company.

C. B. Heinemann for Morris & Company.

A. P. Humburg for Illinois Central Railroad Company.

H. W. Swanson for Fox River Butter Company.

REPORT OF THE COMMISSION.

DANIELS, Commissioner:

The tariff under suspension in this proceeding is that of the Illinois Central Railroad Company increasing the minimum weight at which a special refrigerated car will be furnished for the movement of butter, eggs, dressed poultry, fresh fish, and fresh meat from 10,000 to 15,000 pounds, from Chicago to southern territory, while leaving in effect from St. Louis to that same territory a minimum of 10,000 pounds.

The protestants at whose instance the tariff was suspended are shippers of these articles from Chicago. Both the carrier and the protestants appeared upon the hearing. The respondent

carrier introduced testimony tending to justify the increase. The protestants gave no evidence, but asked leave to file a brief, which has been done.

Two questions are presented:

First. Is the increased minimum reasonable?

Second. Is there a discrimination against Chicago in favor of St. Louis?

Rates upon dairy products, dressed poultry, fresh fish, and sometimes fresh meat, are usually based on any-quantity rates — that is, there is no carload rate, the charge for transportation being the same per 100 pounds whether offered for shipment in large or small quantities. These articles for the most part must be moved in refrigerator cars. The Illinois Central maintains from Chicago to most of the points covered in this controversy what is known as a regular refrigerator service. If these commodities are delivered to the Illinois Central at its freight house, they will be transported under refrigeration to destination at the regular rate. If so handled, they are placed in a refrigerator car along with other commodities belonging to other shippers.

In addition to this regular refrigerator service the Illinois Central offers a special refrigerator service. It sets apart a special car for the use of a single shipper and refrigerates this car upon condition that the amount shipped in the car shall equal a certain number of pounds. The minimum formerly in effect was 10,000 pounds; the increased minimum is 15,000 pounds.

The evidence shows that in official classification territory the minimum in effect at the time of the hearing was usually 15,000 pounds; but it also appears that in a portion, at least, of this territory that minimum had formerly been 10,000 pounds, the increase having been made less than one year before the hearing. In western trunk line territory this minimum is 15,000 pounds, while in the south it runs from 5,000 to 10,000 pounds; in the southwest and the far west the minimum is usually 10,000 pounds.

It is difficult so see how a carrier can justify the giving of this special service to a single shipper, unless it be upon the ground that the cost of the service to the carrier is thereby to such an extent reduced that it can properly, in the protection of its own just interest, tender the tariff. Certainly a carrier should not be required to furnish a special service of this kind unless the carrier be allowed as an incident to protect its revenues by re-

quiring a substantial loading sufficient adequately to utilize its equipment.

As already noted, no carload rate as such applies to these commodities, but this special carload arrangement has many of the characteristics of the carload rating. The car is put at the exclusive disposal of the shipper. It is placed for loading where he directs and is loaded by him. Having been loaded, the car is sealed up, taken to destination, and there delivered, and unloaded at the convenience of the shipper. The giving of this special service is tantamount, by reason of the special convenience it affords, to a reduction in the rate; and while the Commission has frequently held that carload rates should be lower than less than carload, it has also held that in the establishing of a carload minimum the carrier may secure the economical use of its equipment.

All these commodities readily load to 15,000 pounds and often much in excess thereof. In the absence of countervailing considerations, it is a wasteful transaction to handle 10,000 pounds of merchandise in a car when 15,000 can be carried with equal facility. The mounting cost of operation in these days should be avoided in every proper manner. There is no testimony in this case to show that the protestants can not readily avail themselves of the 15,000-pound minimum, although, of course, they prefer the greater latitude afforded by the smaller minimum.

The second claim of the protestants is that the making of this increase from Chicago, without a corresponding increase from St. Louis, is a discrimination against Chicago.

Upon the hearing the respondent stated that the rate was not increased from St. Louis because several of the competitors of the respondent were unwilling to quote a minimum in excess of 10,000 pounds. It further stated, however, that very little traffic, if any, moved under this provision from St. Louis, and that, therefore, it was immaterial to it, as a practical matter, whether the minimum from St. Louis were 10,000 or 15,000 pounds. It was stated upon the hearing, and is repeated in the brief of the respondent, that the minimum from St. Louis would be increased to 15,000 pounds, thereby eliminating the discrimination.

There is nothing in this record which fairly shows that competitive conditions at St. Louis justify the respondent in maintaining a lower minimum from that locality than from Chicago, although some justification therefor was suggested upon the hearing. It must therefore be found upon the record that the increase

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from Chicago, without a corresponding increase from St. Louis, creates an undue discrimination against Chicago.

Our finding is that the increase from 10,000 to 15,000 pounds in the minimum weight at which special refrigerated cars will be furnished for this service is reasonable, provided the respondent eliminate the element of discrimination by a similar increase in the minimum weight for the same service from St. Louis. The order of suspension will be vacated upon the filing of a tariff in accordance with this finding. If such tariff is not filed by July 1, 1914, an appropriate order will be entered.¹

405. McCaa Coal Co v Coal and Coke RR

Complain by coal mine owners as to the method of distributing cars in time of car shortage, claiming discrimination in favor of one large mine. RR took physical capacity as determined by information furnished by the mines, added commercial cap for 4 mo and divided by 3. Phy cap of Davis mine purposely inflated.

Held: Physical method bad. Unjust discrimination. Proportionate necessity for cars as judged by past performance better. Average daily output (No reparation, however, given to complainants, for no proof of damage to them.)

415. Intermountain Rate Cases.

Long and Short Haul Question. RRs ask in view of water competition, that they be allowed to charge less rates for shipments to Pacific coast points than to points east

mines on the line of the defendant railway company which extends from Charleston to Elkins in the state of West Virginia. There are a number of other mines operating on this defendant's road and among these are the mines owned by the Davis Colliery Company. These mines, designated by their location, are as

¹ The Commission has justified discrimination in the following kinds of situations: granting more favorable rates at a competitive point, *Seattle Shingle Co. v. C. M. & St. P. Ry. Co.* 30 I. C. C. 364; granting of more favorable rates to a point not shipping the sole commodity shipped by another point, *Seattle Shingle Co. v. C. M. & St. P. Ry. Co.* 30 I. C. C. 364; granting more favorable rates to points moving freight in train loads, *Consolidated Fuel Co. v. A., T., & S. F. Ry.* 24 I. C. C. 213, 215. See also, *Pueblo Commerce Club v. D. & R. G. R. R. Co.* 31 I. C. C. 133, *Stock & Sons v. L. S. & M. S. Ry. Co.* 31 I. C. C. 150, *Kaufman Commercial Club v. T. & N. O. R. R. Co.* 31 I. C. C. 167, 171. — Ed.

follows: Walton, Sivad, Bower, and Copen. It appears that this company and the defendant railway company are owned and controlled by substantially the same interests.

It is contended by the complainants that in the distribution of coal cars they are discriminated against in favor of the Davis Colliery Company; the discrimination manifesting itself both in the computation of the mine rate and in the distribution of the cars under the mine rate established according to the system employed by the defendant. Reparation for the damages sustained by reason of such discrimination is sought in substantial amounts by three of the complainants.

This case presents another of the perplexing car distribution situations, and it might be noted at the outset that this case will be discussed with a view of adjusting the particular situation in the particular locality in which it has arisen and that what may be said here in no wise affects the previous rulings of this Commission with respect to other car distribution situations in other localities; for, as said by the Commission in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C., 86, 96:

"It seems to be rationally and logically a question of fact to be determined according to the circumstances and conditions existing in each particular case."

And in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 119 I. C. C., 356, 361:

"The principle of *stare decisis* has little application in proceedings before us involving questions of this nature."

It seems to be a general situation that each year during the winter months the demand for coal increases to a point where the ordinary facilities of the carriers will not accommodate the traffic. The congestion entailed always manifests itself in a shortage of coal cars. This condition is always accompanied by a higher priced market for coal, and mining operations are consequently more profitable, dependent, however, upon receiving sufficient of the available cars to market the output. The allotment of the available cars to which the mine is entitled each day during such a period becomes a matter of the most vital importance. Under the general practice, during such periods the available cars are distributed each day according to a certain percentage basis under rules prescribed by the carriers.

The cases indicate that several different systems are employed by the carriers in determining this percentage basis. There was the case in which the number of coke ovens was taken as forming

the basis on which the percentage was figured, *Powhatan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I. C. C., 69. In *Rail & River Coal Co. v. B. & O. RR. Co.*, *supra*, the physical capacity of the mine was taken as one factor, to which was added the commercial capacity taken for a four months' period of free car supply for each of two years as the other factor, and the result divided by three. In a later case, *Hillsdale Coal Co. v. P. R. R. Co.*, *supra*, the physical capacity was added to the commercial capacity as figured for the preceding 12 months and the result divided by two. How the physical capacity and commercial capacity are determined was explained in the *Rail and River case*, page 93, and will not be recited here.

In the instant case the system employed is practically the same as that in the *Hillsdale case*, except that if the resultant figure obtained is greater than the tippie or haulage capacity the lesser of these is taken as the basis of the mine rate. Fault could be found with that part of defendant's method of calculation in which it differs with that employed in the *Hillsdale case*, because necessarily the tippie capacity is the maximum of a mine's physical capacity; a mine can not produce any more coal than can be passed over its tippie.

It is the practice of the defendant to require the mines on its road to furnish quarterly, on blanks supplied by it, detailed information concerning the physical and operating conditions of the mine, such as the coal loaded during each of the months for the 12 months' period prior; average thickness of coal seam; number of working places available; number of miners working; number of miners that could be worked to advantage; average capacity of each miner; whether or not machines are used in mining; number of miners' houses occupied; haulage capacity; and tippie capacity.

With this information before it the defendant disregards all of it except the reported number of working places; in each working place it imagines two miners working with a capacity per miner as reported, and with this calculation the physical capacity is determined. The working places reported which form so important a basis for this calculation may never have been worked, tracks may never have been laid into them, and it seems to be sufficient if they are simply marked out. Again, the working places reported may have been old working places that have been exhausted. Whether machines are used in the mine, a circumstance which would greatly increase the output for the

number of men, seems not to enter into consideration, nor the thickness of the seam of coal, nor the number of men who could be housed. Yet each of these conditions bears directly and necessarily upon the physical possibilities of the mine.

The justification for this curtailed calculation by the defendant is that the same calculation is made for each mine, and made in the same way, and therefore everybody being treated alike there is no discrimination. But two wrongs or several wrongs never made a right, and the evil of this method of calculation is best shown by the following table compiled from defendant's rate sheet No. 5.

Coal & Coke Railway Company rating No. 5, effective Feb. 1, 1912.

Name of mine.	Commercial capacity.			Physical Capacity.		Cap-acity	Haul-age capacity	Tipple capacity	Mine rate
	Ship-ments for 12 months.	Aver-age 300 work-ing days.	Total work-ing places	Num-ber of men can be work'd	Tons per man per day				
Jenkins Coal & Coke Co.	9,940	33	42	84	10	840	(¹)	1,000	437
Brady Coal Co.	17,834	59	75	150	10	1,500	600	600	600
W. H. Green	15,743	53	82	64	10	640	400	800	346
Davis Colliery Co. No. 1 (Coalton)	105,992	353	240	480	10	4,800	4,000	4,000	2,577
Davis Colliery Co. No. 2 (Sivad)	35,383	118	140	280	10	2,800	2,000	2,000	1,459
Adrian .....	.....	16	104	208	6	1,248	1,200	1,500	632
Gilmer Fuel Co.	49,428	165	120	240	8	1,920	.....	.....	1,043
Copen Creek Coal Co. .	2,363	7	10	20	8	160	200	500	84
Davis Colliery No. 10 (Bower)	145,684	486	172	344	8	2,752	2,000	4,000	1,619
Davis Colliery No. 11 (Copen)	40,776	136	74	148	8	1,184	600	600	600
Braxton Coal & Coke Co.	2,042	7	12	24	7	168	300	400	88
Widen mine (B. C. & G. R. R.)	* 67,352	385	86	172	10	1,720	3,000	2,500	1,500
Elk Manor Coal Co.	46,748	156	82	164	8	1,312	1,000	800	734
Clay Coal Co.	20,004	67	108	216	5	1,080	300	900	300
Queen Shoals No. 1	27,185	91	18	36	6	216	200	250	} 219
Queen Shoals No. 2 .....	.....	.....	11	22	6	132	.....	250	
Turner mine (Steele & Payne Co.)	26,705	89	76	152	8	1,216	600	750	653
Pen Mar mine	4,512	15	15	30	6	180	.....	300	98
Peacock mine	2,194	7	14	28	6	168	.....	400	88
Total .....	.....	2,243	.....	.....	.....	.....	.....	.....	13,077

¹ Unlimited capacity.

* 7 months.

NOTE. — It should be noted that the physical capacity of each of the Davis mines is rated above its tipple or haulage capacity, and that in some of the calculations for physical capacity 8 tons per man and in others 10 tons per man and in some as low as 6 tons per man is taken as the capacity per miner per day.

The best that can be said for these calculations as to physical capacity is that they are arbitrary inflations, which furnish noth-

ing real or tangible, yet form the largest determinative factor in the mine rate. The larger this imaginary figure can be made, the larger, of course, will be that mine's rating, no matter what its actual performances are or what they have been in the past or what they are likely to be in the immediate future. The larger the mine rate the greater percentage of available cars will be its share during the car-shortage periods. If this imaginary figure can be inflated enough, it can be so manipulated that one mine will have sufficient cars to handle all its output, even during car-shortage periods, when competitive mines are being handicapped for lack of cars because their percentage or mine rate is so much lower in proportion to output.

These physical-capacity figures for the Davis mines seem to have been purposely inflated, and, to keep in line, many of the independent mines do the same thing, until the daily percentage of cars assignable to a single mine is much in excess of that mine's ability to load if its full allotment should be furnished to it on successive days. And it appears that in most cases about 30 per cent of a mine's present rating would supply that mine with all the cars it could load in a day's run. There are a number of rules incident to car distribution which have been prescribed by the defendant; two are, in effect, as follows: The entire allotment of cars must be ordered if any cars are wanted, and enough cars will be supplied where possible to make at least a day's run for a mine. Applying these two rules under the inflated allotment, the defendant has so supplied cars to the independent mines that these mines have more cars dumped on them in one day than they can possibly load, with the result that those not loaded go over to penalize them on the next day's supply and are put against their full allotment for that day, the remainder of the full allotment, however, being furnished, so that by reason of penalties the mine's allotment for the month is exhausted in a few days, and the mine remains idle for the balance of the month. On the other hand, in supplying the Sivad, a Davis mine, during the same period with a commercial capacity of 150 tons per day, or an equivalent of $3\frac{1}{2}$ cars, having an allotment, however, under defendant's method of 28 cars per day; the largest number of cars furnished this mine in any one day in September, 1912, was 8 cars, and no cars were furnished the following day; on three days 7 cars were furnished; on two days following those on which the 7 cars were furnished 2 cars and 3 cars were furnished and the mine loaded out. On 2 other days 6 cars were furnished, on

the other days 5 cars or less were furnished, so that, for example, in October, 1912, out of 27 working days, the Davis mines averaged $20\frac{1}{2}$ days, whereas those of the complainants averaged only 7.9 days. In November, 1912, the Davis mines averaged $20\frac{1}{2}$ days and complainants 9.7 days. The cars seem to have been so supplied to the Davis mines that they could run regularly. The importance of this is that when a mine can not operate regularly the miners leave and go to the mines that can operate regularly, thus paralyzing the inactive mines for the balance of the car-shortage period.

It appears further that the miners insist on beginning work at 7 o'clock in the morning; it is therefore necessary that cars must be ready to be loaded at that time or a day's run can not be made. It appears that defendant makes a practice of furnishing the Davis mines with their cars before 7 o'clock of the days ordered, while with the complainants deliveries are made late in the afternoon frequently, with the result that the mines can not be worked until the following day.

From the results thus obtained under the system of car distribution employed by the defendant, as above indicated, it seems that it must have been devised and prosecuted with a view to furnishing the mines which are owned by the same interests as the defendant railroads all the cars required during periods of car shortage and high prices. The discrimination permitted by this system, as indicated, is of the most insidious character, calling for drastic action by this Commission.

In view of all the facts appearing in this case, it is our opinion and finding that the distribution of coal cars based upon the element of physical capacity is wholly unsatisfactory and works injustice. The best basis for the distribution of cars in this case is the proportionate necessities of the mines, as indicated by past performances, extending over periods of car shortage as well as periods of free distribution. No basis of distribution can be absolutely precise. It is not necessary, however, to imagine anything or to deal in speculations or possibilities. The total shipments of each mine, taken for the two-year period prior to January 1, 1913, divided by the number of 10-hour days the mine actually operated during such period furnishes the actual average daily output over a two-year period during car shortage as well as during free car supply. Such a basis will not permit speculation, but will reflect the operations and possibilities of each mine as truly as they can be ascertained, and such shall be

the basis hereafter. This basis may be readjusted quarterly on reports to the defendant as now made, which shall also include information of the actual performance of each mine as herein indicated. Also, cars must be supplied to all operators as of 7 A.M. of the day charged. Where the mine's percentage is not high enough to entitle it to one car in the distribution for the day its order shall go over to the next day and such mine shall be supplied before any other on the next day's distribution. In the case of a new mine or a mine that did not operate during the period above described, an arbitrary allotment shall be made upon request, which shall bear due relation to other operating mines of similar proportions. It is recommended that the defendant continue to require the mines to report quarterly, as now, concerning their operations, and the mine operators are cautioned that these reports hereafter must not be padded. By reason of the financial and personal relation existing between the defendant company and the Davis Colliery Company, in complying with the views expressed herein the strictest impartiality will be required. In the first instance, it will be left to the defendant to make effective the suggestions incorporated herein. If this is not done prior to August 1, 1914, upon complainants bringing the matter to the attention of the Commission, appropriate order will be entered.

The basis of distribution herein prescribed will reduce the annual periods of car shortage and consequent percentage periods. The total tonnage basis under the present system is very much inflated and the resultant car requirements much more extended than the actual demand warrants. The tonnage basis will be greatly reduced and will be more in accord with actual car requirements and the period of car shortage will be correspondingly reduced.

The peculiar situation presented by the fact that the Coalton mine cokes a large portion of its output is also solved by the adoption of the basis of distribution indicated herein. The Coalton mine coked about 625 tons of its output of coal per day and shipped, as indicated in the table above, an average of 353 tons a day with an indicated physical capacity of 4,800 tons. The point was made that this mine was entitled to have its whole physical capacity taken into consideration in its allotment, although it usually coked most of its output. Such a consideration of physical capacity gives this mine an unwarranted advantage.

Complainants have not proved that they have been damaged by reason of the discrimination complained of, and on principle of *New Orleans Board of Trade v. I. C. R. R. Co.*, 29 I. C. C., 32, reparation will be denied.

INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS
CENTRAL RAILROAD COMPANY.

215 U. S. 452 (1910).¹

MR. JUSTICE WHITE delivered the opinion of the court.

In view of the facts found by the commission as to preferences and discriminations resulting from the failure to count the company fuel cars in the daily distribution in times of car shortage, and in further view of the far-reaching preferences and discriminations alleged in the answer of the commission in this case, and which must be taken as true, as the cause was submitted on bill and answer, it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of § 3 of the act to regulate commerce prohibiting preferences and discriminations. But it is contended that although this be the case, as the order of the commission not only forbade the preferences and discriminations complained of, but also commanded the establishment of a rule, excluding such discriminations for a future definite period of not exceeding two years, the order transcended the authority conferred upon the commission. This proceeds upon the assumption that § 15 of the act to regulate commerce, as enacted by the act of June 29, 1906, while conferring upon the commission the authority, upon complaint duly made, to declare a rate or practice affecting rates illegal, and to establish a new and reasonable rule or practice affecting such rates for a term not exceeding two years, has no relation to complaints concerning preferences or discriminations, unless such practices, when complained of, are of a character to affect rates, which it is insisted is not here the case. The pertinent part of the section in question (15) reads as follows, 34 Stat. 589:

"That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint

¹ The facts and other portions of the opinion will be found on page 172, *supra*. — ED.

made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed.

"All orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or modified or set aside by the commission or be suspended or set aside by a court of competent jurisdiction."

The contention gives to the words found in the earlier part of the section, "any regulation or practice whatsoever of such carrier or carriers affecting such rates," a dominant and controlling power so as to cause them to limit every other provision in the section, however general in its language. We do not stop to critically examine the provision relied upon for the purpose of pointing out, as a matter of grammatical construction, the error of the contention, because we think, when the text of the section is taken into view and all its provisions are given their natural significance, it obviously appears that the construction relied upon is without foundation, and that to sustain it would be to frustrate the very purpose which it is clear, when the entire provision is considered, it was designed to accomplish, and thus would be destructive of the plain intent of Congress in enacting the provision. The antecedent construction which the Interstate Commerce Act had necessitated, and the remedial character of the amendments

adopted in 1906, all serve to establish the want of merit in the contention relied upon. In addition, to adopt it would require us to hold that Congress, in enlarging the power of the commission over rates, had so drafted the amendment as to cripple and paralyze its power in correcting abuses as to preferences and discriminations which, as this court has hitherto pointed out, it was the great and fundamental purpose of Congress to further.

Conceding, for the sake of the argument, the existence of the preferences and discriminations charged, it is insisted, when the findings made by the commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that the regulation addresses itself, not to the right to purchase, but to the duty to make equal distribution of cars. The right to buy is one thing and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. The insistence that the necessary effect of an order, compelling the counting of company fuel cars in fixing, in case of shortage, the share of cars a mine from which coal has been purchased will be entitled to, will be to bring about a discrimination against the mine from which the company buys its coal and a preference in favor of other mines, but inveighs against the expediency of the order. And this is true also of a statement in another form of the same proposition, that is, that if, when coal is bought from a mine by a railroad the road is compelled to count the cars in which the coal is moved in case of car shortage, a preference will result in favor of the mine selling coal and making delivery thereof at the tippie of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to viola-

tions of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER ~~Justice~~
415. Intermountain Rate Cases.

LONG AND SHORT HAUL QUESTION. RRs ask, in view of water competition, that they be allowed to charge less rates for shipments to Pacific coast points than to points east of them, ICC allows this in certain cases, dividing country into several zones and specifying percentage above which this diff in rates sd not go. Commerce Ct at instance of RR enjoined this. APP.

Held: Reversed. ICC right (Under 1910 Amendment)

1. Meaning of the statute Carrier can no longer charge less for shorter than for longer haul, bec 4th, 3d, and 2d sections of Act.

2. Constitutionality as regards delegating of legislative power. O.K. Can surely give to ICC what RRs had before.

3. Validity of order under this act. O.K. doing very similar thing to what the RRs themselves did in fixing rates. Zones of influence. Consider competition and fix percentages. This was within the power granted

Mr. Joseph N. Teal for Portland Chamber of Commerce.

Mr. J. B. Campbell for the City of Spokane.

Mr. William A. Glasgow, Jr., for Giroux Consolidated Mines Co.

By leave of the court, *Mr. Alfred P. Thom* filed a brief in behalf of certain interested parties.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of Section 4 of the Act to Regulate Commerce dealing with what is known as

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favor of the mine selling coal and making delivery thereof at the tipples of the mine to a person who is able to consume it without the necessity of transporting it by rail. At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to viola-

tions of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. It follows from what we have said that the court below erred in enjoining the order of the commission, in so far as it related to company fuel cars, and its decree is therefore reversed, and the case remanded for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER dissents.

INTERMOUNTAIN RATE CASES.

234 U. S. 476 (1914).

The facts are stated in the opinion.

Mr. Attorney General [Wickersham] and Mr. Assistant to the Attorney General Fowler, with whom Mr. Blackburn Esterline, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Charles Donnelly, Mr. F. W. M. Cutcheon and Mr. F. C. Dillard for appellees.

Mr. Rush C. Butler, Mr. William E. Lamb, Mr. Stephen A. Foster and Mr. Cornelius Lynde filed a reply brief on behalf of the Chicago Association of Commerce.

Mr. Joseph N. Teal for Portland Chamber of Commerce.

Mr. J. B. Campbell for the City of Spokane.

Mr. William A. Glasgow, Jr., for Giroux Consolidated Mines Co.

By leave of the court, *Mr. Alfred P. Thom* filed a brief in behalf of certain interested parties.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of Section 4 of the Act to Regulate Commerce dealing with what is known as

the long and short-haul clause, the power of carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause and the authority of the Interstate Commerce Commission in relation to such subjects were materially amended by the act of June 18, 1910, chap. 309, 36 Stat. at L. 547. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of Amended Commerce Act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast and from the Pacific coast to the Atlantic seaboard and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition: "This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via the shorter or more direct routes, but applied also via the longer or more circuitous routes." After full hearing the Commission refused to grant unqualifiedly the prayer of the petition but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points, provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points, the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the

entire territory into separate zones, which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the Commerce Court praying a decree enjoining the enforcement of the fourth section as amended on the ground of its repugnancy to the Constitution of the United States and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss and on the overruling of the motions appealed from the interlocutory order, the case being No. 136. Subsequently upon the election of the defendants to plead no further a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold on the one hand or to overthrow on the other the action of the Commission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to deal with the subject involved in the complaint because controversies concerning the fourth section of the Act to Regulate Commerce of the nature here presented were by an express statutory provision excluded from the cognizance of the court below. (b) That even if this be not the case the action of the Commission which was complained of was purely negative and therefore not within the cognizance of the court because not inherently justiciable. (c) That correctly interpreting the fourth section the order made by the Commission was absolutely void because wholly beyond the scope of any power conferred by the fourth section as amended. (d) That even if in some respects the order of the Commission was within the reach of its statutory power there was intermingled in the order such an exertion of authority not delegated as to cause the whole order to be void. (e) That the order of the Commission was void even if the fourth section be interpreted as conferring the authority which the Commission exerted, since under that assumption the fourth section as amended was repugnant to the Constitution.

All the propositions, even including the jurisdictional ones, are concerned with and depend upon the construction of the fourth

section as amended, and we proceed to consider and pass upon that subject and every other question in the case under four separate headings: 1, The meaning of the statute; 2, Its constitutionality; 3, The jurisdiction of the court; 4, The validity of the order in the light of the statute as interpreted.

1. *The meaning of the statute.*

We produce the section as originally adopted and as amended, passing a line through the words omitted by the amendment and printing in italics those which were added by the amendment, thus at a glance enabling the section to be read as it was before and as it now stands after amendment.

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line *or route* in the same direction, the shorter being included within the longer distance, *or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act;* but this shall not be construed as authorizing any common carrier within the terms of this Act to charge *or* receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Interstate Commerce Commission, such common carrier may in special cases, after investigation, be authorized *by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*

"Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."

Before considering the amended text we state briefly some of the more important requirements of the section before amendment and the underlying conceptions of private right, of public duty and policy which it embodied, because to do so will go a long way to remove any doubt as to the amended text and will moreover serve to demonstrate the intent of the legislative mind in enacting the amendment.

Almost immediately after the adoption of the Act to Regulate Commerce in 1887 the Interstate Commerce Commission in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long and short-haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. We say primarily because of course it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing and were therefore operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where within the purview of the fourth section it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction being authorized could not be a preference or discrimination and therefore illegal. *In re Louisville & Nashville R. R. Co.*, 1 I. C. C. Rep. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court, and to the leading of such cases¹ we

¹ *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 263; *Cinn., N. O. & Tex. Pac. Ry. v. Int. Com. Com.*, 162 U. S. 184; *Texas & Pac. Railway v. Int. Com. Com.*, 162 U. S. 197; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648; *Eastern Tenn. &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1.

refer in the margin. We observe, moreover, that in addition it came to be settled that where competitive conditions authorized carriers to lower their rates to a particular place the right to meet the competition by lowering rates to such place was not confined to shipments made from the point of origin of the competition, but empowered all carriers in the interest of freedom of commerce and to afford enlarged opportunity to shippers to accept, if they chose to do so, shipments to such competitive points at lower rates than their general tariff rates: a right which came aptly to be described as "market competition" because the practice served to enlarge markets and develop the freedom of traffic and intercourse. It is to be observed, however, that the right thus conceded was not absolute because its exercise was only permitted provided the rates were not so lowered as to be non-remunerative and thereby cast an unnecessary burden upon other shippers. *Eastern Tenn., &c. R. Co. v. Interstate Com. Com.*, 181 U. S. 1. As the statute as thus construed imposed no obligation to carry to the competitive point at a rate which was less than a reasonable one, it is obvious that the statute regarded the rights of private ownership and sought to impose no duty conflicting therewith. It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions and to meet them at election the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand and of the right of the shipper on the other to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places, considerations all of which therefore in their ultimate aspects came within the competency of legislative regulation. It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the subject both of administrative control and ultimate judicial review. And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long and short-haul clause it but gave the carrier the power to exert a judgment as to things public was long since pointed out by this court. *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197, 218.

With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short-haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property" and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short-haul clause and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment or so to speak the system of law by which judgment is to be controlled remains unchanged but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a higher rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved and if not is in any event by necessary implication granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted

compatibly with a due consideration of the private and public interests concerned and in view of the preference and discrimination clauses of the second and third sections.

2. *The alleged repugnancy of the section as amended to the Constitution.*

But if the amendment has this meaning it is insisted that it is repugnant to the Constitution for various reasons which superficially considered seem to be distinct but which really are all so interwoven that we consider and dispose of them as one. The argument is that the statute as correctly construed is but a delegation to the Commission of legislative power which Congress was incompetent to make. But the contention is without merit. *Field v. Clark*, 143 U. S. 649; *Buttfield v. Stranahan*, 192 U. S. 470; *Union Bridge Co. v. United States*, 206 U. S. 364; *United States v. Heinszen*, 206 U. S. 370; *St. Louis, &c. Ry. Co. v. Taylor*, 210 U. S. 281; *Monongahela Bridge Co. v. United States*, 216 U. S. 177. We do not stop to review these cases because the mere statement of the contention in the light of its environment suffices to destroy it. How can it otherwise be since the argument as applied to the case before us is this; that the authority in question was validly delegated so long as it was lodged in carriers but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that in last analysis the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory since it reduces itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated. In addition, however, before passing from the proposition we observe that when rightly appreciated the contention but challenges every decided case since the passage of the Act to Regulate Commerce in 1887 involving the rightfulness of the exertion by a carrier of the power to meet competition as a means of being relieved from the long and short-haul clause of the fourth section before its amendment. While what we have already said answers it, because of its importance we notice another contention. As the power of carriers to meet competition and the relation of that right to non-competitive places may concern the fortunes of numberless individuals and the progress and development of many communities, it is said, to permit authority to be exerted concerning the subject without definite rules for its exercise will be to destroy the rights of persons and

communities. This danger, the argument proceeds, is not obviated by declaring that the provisions of the second and third section as to undue preference and discrimination apply to the fourth section, since without a definition of what constitutes undue preference and discrimination, no definite rule of law is established but whim, caprice or favor will in the nature of things control the power exerted. And it is argued that this view is not here urged as the mere result of conjecture, since in the report of the Commission in this case it was declared in unequivocal terms as the basis of the order entered that the statute vested in the Commission a wide and undefined discretion by virtue of which it became its duty to see to it that communities and individuals obtained fair opportunities, that discord was allayed and commercial justice everywhere given full play. Let it be conceded that the language relied upon would have the far-reaching significance attributed to it if separated from its context, we think when it is read in connection with the report of which it but forms a part, and moreover when it is elucidated by the action taken by the Commission there is no substantial ground for holding that by the language referred to it was entitled to declare that the fourth section as amended conferred the uncontrolled exuberance of vague and destructive powers which it is now insisted was intended to be claimed. In any event, however, we must be governed by the statute and its plain meaning. After all has been said the provisions as to undue preference and discrimination, while involving of course a certain latitude of judgment and discretion are no more undefined or uncertain in the section as amended than they have been from the beginning and therefore the argument comes once more to the complaint that because public powers have been transferred from the carriers to the Commission, the wrongs suggested will arise. Accurately testing this final result of the argument it is clear that it exclusively rests upon convictions concerning the impolicy of having taken from carriers, intimately and practically acquainted as they are with the complex factors entering into rate making and moreover impelled to equality of treatment as they must be by the law of self-interest operating upon them as a necessary result of the economic forces to which they are subjected, and having lodged the power in an official administrative body which in the nature of things must act, however conscientiously, from conceptions based upon a more theoretical and less practical point of view. But this does not involve a grievance based upon the construction or application of the fourth section as amended but upon the wisdom of the legislative judg-

ment which was brought into play in adopting the amendment, a subject with which we have nothing in the world to do. It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission is a proper case to refuse an application, therefore the law is void because in such a contingency the statute would amount to an imperative enforcement of the long and short-haul clause and would be repugnant to the Constitution. It is conceded in the argument that it has been directly decided by this court that a general enforcement of the long and short-haul clause would not be repugnant to the Constitution (*Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503), but we are asked to reconsider and overrule the case and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself but also because of those already expounded in this opinion and for an additional reason which is that the contention by necessary implication assails the numerous cases which from the enactment of the Act to Regulate Commerce down to the present time have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short-haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short-haul clause. How can it be otherwise since if this were not the case all the issues presented in the numerous cases would have been merely but moot, affording therefore no basis for judicial action since they would have had back of them no sanction of lawful power whatever. . . .¹

4. *The validity of the order in the light of the statute as interpreted.*

The order is in the margin.² The main insistence is that there

¹ The Court here considered the jurisdiction of the Commerce Court.
—Ed.

² FOURTH SECTION ORDER NO. 124

In the matter of the applications, Nos. 205, 342, 343, 344, 349, 350, and 352, on behalf of the Transcontinental Freight Bureau, by R. H. Countiss, agent, for relief from the provisions of the fourth section of the act to regulate commerce as amended June 18, 1910, with respect to rates made from eastern points of shipment which are higher to intermediate points than to Pacific terminals.

COMMODITY RATES

These applications, as above numbered on behalf of the Transcontinental Freight Bureau, ask for authority to continue rates from eastern points of

was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points, that is to say, that under the power transferred to it by the section as amended the Commission was limited to ascertaining the existence of competition and to authorizing the carrier to meet it without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer and hence that the power perished as the result of the act by which it was conferred. As the prime object of the transfer was to vest the Commission

shipment which are higher to intermediate points in Canada and in the States of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other States east thereof, than to Pacific coast terminals.

Full investigation of the matters and things involved in these petitions, in so far as they concern westbound commodity rates, having been had,

It is ordered, That for the purposes of the disposition of these applications, the United States shall be divided into five zones, as described in the following manner:

(The transcontinental group hereinafter described are as specified in R. H. Countiss, agent's, transcontinental Tariff I. C. C. No. 929.)

Zone No. 1 comprises all that portion of the United States lying west of a line called Line No. 1, which extends in a general southerly direction from a point immediately east of Grand Portage, Minn.; thence southwesterly, along the northwestern shore of Lake Superior, to a point immediately east of Superior, Wis.; thence southerly, along the eastern boundary of Transcontinental Group F, to the intersection of the Arkansas and Oklahoma State line; thence along the west side of the Kansas City Southern Railway to the Gulf of Mexico.

Zone No. 2 embraces all territory in the United States lying east of Line No. 1 and west of a line called Line No. 2, which begins at the international boundary between the United States and Canada, immediately west of Cockburn Island, in Lake Huron; passes westerly through the Straits of Mackinaw; southerly, through Lake Michigan to its southern boundary; follows the west boundary of Transcontinental Group C to Paducah, Ky.; thence follows the east side of the Illinois Central Railroad to the southern boundary of Transcontinental Group C; thence follows the east boundary of Group C to the Gulf of Mexico.

Zone No. 3 embraces all territory in the United States lying east of Line No. 2 and north of the south boundary of Transcontinental Group C, and

within the scope of the discretion imposed and subject in the nature of things to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act with authority to consider competitive conditions and their relation to persons and places, necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other and the establishment of the basis by percentages was within the power granted. As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. As we have pointed out though somewhat modified the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate-making which was included in the tariffs which were under investigation and therefore we may put that subject out of view. Indeed, except as to questions of power there is no contention in the argu-

on and west of Line No. 3 which is the Buffalo-Pittsburg line from Buffalo, N. Y., to Wheeling, W. Va., marking the western boundary of Trunk Line Freight Association territory; thence follows the Ohio River to Huntington, W. Va.

Zone No. 4 embraces all territory in the United States east of Line No. 3 and north of the south boundary of Transcontinental Group C.

Zone No. 5 embraces all territory south and east of Transcontinental Group C.

It is further ordered, (1) That those portions of the above-numbered applications that request authority to maintain higher commodity rates from points in Zone No. 1 to intermediate points than to Pacific coast terminals be, and the same are hereby denied, effective November 15, 1911; (2) that petitioners herein be, and they are hereby authorized to establish and maintain, effective November 15, 1911, commodity rates from all points in zones numbered 2, 3, and 4, as above defined, to points intermediate to Pacific coast terminals that are higher to intermediate points than to Pacific coast terminals; provided, that the rates to intermediate points from points in zones numbered 2, 3, and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific coast terminals by more than 7 per cent from points in Zone No. 2, 15 per cent from points in Zone No. 3, and 25 per cent from points in Zone No. 4.

The commission does not hereby approve any rates that may be established under this authority, all such rates being subject to complaint, investigation, and correction if they conflict with any other provisions of the act.

By the commission:

[SEAL]

JUDSON C. CLEMENTS,
Chairman

ment as to the inequality of the zones or percentages or as to any undue preference or discrimination resulting from the action taken. But be this as it may, in view of the findings of the Commission as to the system of rates prevailing in the tariffs which were before it, of the inequalities and burdens engendered by such system, of the possible aggrandizement unnaturally beyond the limits produced by competition in favor of the competitive points and against other points by the tariff in question, facts which we accept and which indeed are unchallenged, we see no ground for saying that the order was not sustained by the facts upon which it was based or that it exceeded the powers which the statute conferred or transcended the limits of the sound legal discretion which it lodged in the Commission when acting upon the subject before it.

It results that the Commerce Court in enjoining the order of the Commission was wrong and its decree to that end must therefore be reversed and the case be remanded to the proper district court with directions to dismiss the bill for want of equity.

Reversed.

IN THE MATTER OF APPLICATIONS FOR RELIEF
FROM THE OPERATION OF THE FOURTH SECTION
IN REGARD TO CERTAIN RATES ON SALT.

24 I. C. C. 192 (1912).

R. B. Scott and G. H. Crosby for Chicago, Burlington & Quincy Railroad Company.

W. F. Dickinson and W. T. Hughes for Chicago, Rock Island & Pacific Railway Company and St. Paul & Kansas City Short Line Railroad Company.

F. H. Wood for St. Louis & San Francisco Railroad Company.

A. G. Sheer for Atchison, Topeka & Santa Fe Railway Company.

H. E. Pierpont for Chicago, Milwaukee & St. Paul Railway Company.

H. G. Herbel and C. C. P. Rausch for Missouri Pacific Railway Company and St. Louis, Iron Mountain & Southern Railway Company.

J. W. Allen for Missouri, Kansas & Texas Railway Company.

R. V. Fletcher and *B. J. Rowe* for Illinois Central Railroad Company.

N. S. Brown and *H. E. Watts* for Wabash Railroad Company.

REPORT OF THE COMMISSION.

PROUTY, Chairman:

In *Board of Railroad Commissioners of the State of Kansas v. A., T. & S. F. Ry. Co.*, 22 I. C. C., 407, the Commission had before it rates on salt to the Mississippi River and territory west from points of production in Michigan and Kansas. The record in that case showed that these rates had been the subject of much controversy in the past, resulting in the adjustment then in effect which was for the most part approved by the Commission.

Carriers transporting salt from the Kansas field into this territory disregard, in some instances, the rule of the fourth section and had filed applications with the Commission asking leave to continue the charging of the higher rate at the intermediate point. The intention was to set down these applications for hearing along with the above case, but through some oversight notice was not given to all the applicants. Nevertheless the facts were in the main developed in testimony and referred to in argument.

The Commission in its report stated that, so far as that record disclosed, no justification was shown for making the higher intermediate charge, but inasmuch as certain of the interested carriers had been given no opportunity to be heard upon their fourth section applications, leave was granted to any defendant to ask for a further hearing upon that phase of the matter upon the filing of a request therefor, stating the additional facts which could be shown. Such requests were made, the applications were assigned for further hearing, and testimony has been introduced and briefs filed in support of the prayer of these applications by certain of the carriers, so that the matter is now before us for disposition upon a complete record.

Two distinct questions are presented according as the route of the applicant is direct or circuitous.

THE DIRECT LINE.

As will be seen by reference to the original report, which should be examined for an understanding of this report, salt of the same quality and value is produced both in Michigan and Kansas. From Michigan it moves toward the west and from Kansas toward

the east. Since the value of the commodity is very low, the freight rate determines largely the cost at which it can be laid down at a particular point. Rates from these different sources of supply into midway territory lying directly west of the Mississippi River determine, therefore, to a considerable extent, whether the salt which supplies this territory shall come from Michigan or Kansas, and have naturally been in the past the subject of much controversy between carriers leading from these rival fields. As a result a scheme of rates has been devised which blankets a considerable territory west of the Mississippi River.

Rates from the Michigan field to the Mississippi River are lower than these blanket rates. Carriers leading from the Kansas field usually name rates to the Mississippi River which are not as low as the Michigan rate, but are lower than the intermediate blanket rate, and this constitutes the violation of the fourth section against which relief is sought.

St. Louis may be selected as the most marked illustration. It will be seen from the original report that rates on package salt from Michigan points to St. Louis are $11\frac{1}{2}$ cents per 100 pounds, while from Kansas points the rate is $13\frac{1}{2}$ cents. At intermediate points west of St. Louis and east of Kansas City rates ranging from 14 cents to 16 cents per 100 pounds are maintained. The claim of the carriers is that the St. Louis rate is unduly low, that the intermediate rate is reasonable, and that the higher intermediate charge should therefore be permitted.

The brief of one of the defendants states that formerly the rate from Kansas to St. Louis was 15 cents, and that when this rate prevailed no higher rate was maintained at any intermediate point. It was found, however, that salt could not move to that market under this rate in competition with Michigan salt, and for this reason the rate was reduced to $13\frac{1}{2}$ cents. At the same time intermediate rates were readjusted upon the present basis.

Salt does not originate at St. Louis. While that market is located upon the Mississippi River, it does not appear that salt moves into it by water. We have here the simple case of two producing fields served only by rail lines seeking to sell in a common market.

Plainly, if lines leading from the Kansas field to St. Louis are justified in making a higher intermediate charge, then lines from the Michigan field may do the same thing. Still further, Kansas lines may upon the same pretense name a lower rate to points east of St. Louis than they name to St. Louis, and in the same way

lines from Michigan may make a lower charge to the west of St. Louis than the St. Louis rate.

It is urged that St. Louis is an important market, while points both east and west of that locality are comparatively unimportant. But this should be a reason against rather than for the discrimination in favor of St. Louis. If a city is large and prosperous by virtue of natural advantages it may justly be given the benefit of its location, even though that may result in apparent discrimination against smaller intermediate points; but the mere fact that a market is important and a large consumer is not of itself this kind of a natural advantage. One important purpose of the act to regulate commerce was to stop discrimination against the weak, whether individual or locality. While market competition must always be considered, and while it may alone in some cases, perhaps, justify the granting of relief under the fourth section, we can not feel that it does in this case.

It is urged by the carriers that the present adjustment of rates is the outcome of much competitive struggle in the past, is reasonably satisfactory and ought not to be disturbed, as it will be if we prohibit the higher intermediate charge. Even if all this were true in the particular case before us we should not feel justified in setting aside the plain requirement of Congress for the reason that in a particular instance some readjustment of present tariffs might be required. It is difficult to imagine any case to which the inhibition of the fourth section would apply if it does not here, and we are constrained to hold that direct lines leading from the Kansas fields have shown no sufficient justification for their petition to be allowed to continue the charging of a higher rate at the intermediate point, and this request must, therefore, be denied.

THE CIRCUITOUS LINE.

Rates from Kansas points of production to territory west of the Mississippi River are, for the most part, stated in groups, the rates themselves running from 15 cents to 19 cents. To all these points rates by all lines are the same. It frequently happens, therefore, that the long line in handling traffic to a particular point carries it through territory which takes a higher rate than that to the destination group, and this results in a violation of the fourth section.

The following illustration is taken from the brief filed by the Illinois Central Railroad Company: The rate from Hutchinson,

Kans., to Onawa, Iowa, is 18 cents, the distance by the Chicago & North Western and its connections being 455 miles. The distance by the Illinois Central and its connections is 663 miles. Upon the line of the Illinois Central are certain points taking rates of 19 cents.

This Commission has held that where the direct line observes the rule of the fourth section the circuitous line may meet the rate of the direct line, although it makes a higher rate at intermediate points, provided such intermediate rate is reasonable. In such case the two points for consideration are: Is the intermediate rate reasonable, and is the line circuitous?

In the present instance, while we have not found that all these rates from the Kansas field to points west of the Mississippi River are reasonable, still we think it fairly appears that if these tariffs are readjusted so as to comply with the fourth section by the direct line, and if in the process of such readjustment no material advance is made in the present rates it should be held that the rates are reasonable in the absence of objection and to the extent of permitting the maintenance of a higher rate at the intermediate point, provided the line is circuitous.

In disposing of fourth section applications covering passenger fares we ordinarily treated a line as circuitous if it exceeded the direct line in mileage by not less than 15 per cent, and we think the same rule might be fairly applied here. We do not hold that this rule should be made one of universal application in disposing of fourth-section applications involving rates of freight. It is possible that other elements besides mere distance should be considered and that the disabilities of a particular line might be such as would justify the higher intermediate charge even though the distance were no greater. Upon that no opinion is expressed. We simply hold that here, where the conditions under which all these lines are constructed are substantially the same, this rule may be properly applied. If any case which should involve an exception exists it has not been developed in this record.

Permission will, therefore, be denied to the direct line to maintain a higher intermediate charge in violation of the fourth section, but where the direct line observes the fourth section a competing line whose mileage exceeds that of the direct line by not less than 15 per cent will be permitted to meet the rate of the direct line without reducing its present intermediate charge.¹

¹ See Fourth Section Violations in the Southeast, 30 I. C. C. 153. — Ed.

WICKWIRE STEEL COMPANY *ET AL.* v. NEW YORK
CENTRAL & HUDSON RIVER RAILROAD COMPANY
ET AL.

30 I. C. C. 415 (1914).

Robert C. Palmer for Wickwire Steel Company.

Robert F. Schelling for Buffalo Union Furnace Company.

Daniel J. Kenefick for Tonawanda Iron & Steel Company.

George P. Keating for New York State Steel Company.

Louis L. Babcock and *John Henry Hammond* for Lackawanna Steel Company.

William A. Glasgow, Jr., for complainants.

George Stuart Patterson, *O. E. Butterfield*, *William Ainsworth Parker*, and *Harris, Havens, Beach & Harris* for defendants.

REPORT OF THE COMMISSION UPON REHEARING.

MEYER, *Commissioner*:

This proceeding is a reopening of a case decided by the Commission on May 29, 1913, *Wickwire Steel Co. v. N. Y. C. & H. R. R. Co.*, 27 I. C. C., 168, which concerned the rate on coke from the Connellsville region to the blast furnaces and steel mills in and about the city of Buffalo, N. Y.

Prior to April 1, 1910, the rate from the Connellsville region to Buffalo was \$1.65 per ton. On that date the rate was increased to \$1.85. The complainants filed a complaint attacking the increased rate as unjust and unreasonable in and of itself, and also on the ground that in comparison with the rates enjoyed by complainants' competitors, located in the Pittsburgh and Gary districts and eastern Pennsylvania, it was unjustly discriminatory. Complainants also appealed to the courts for an injunction restraining the defendants from putting the increased rate into effect, but this proceeding was unsuccessful. After the amendment to the act to regulate commerce, effective June 18, 1910, they applied to the Commission to suspend the rate, but this petition was denied on the ground that the rate had already gone into effect. The case then proceeded on the petition above described.

The hearings in the original case were held at Buffalo, N. Y., on October 24, 1910, and April 10, 1911. It was argued November 2, 1911. Before the Commission could dispose of the

issues presented a number of complaints involving the rates on coke from the Connellsville region to Buffalo and various other coke consuming points were filed. These cases were Docket No. 3854, *Coke Producers' Asso. v. B. & O. R. R. Co.*, 27 I. C. C., 125; No. 4650, *Pittsburgh Steel Co. v. L. S. & M. S. R. Co.*, 27 I. C. C., 173; No. 4607, *Youngstown Sheet & Tube Co. v. P. & L. E. R. R. Co.*, 27 I. C. C., 165; No. 4449, *Wisconsin Steel Co. v. P. & L. E. R. R. Co.*, 27 I. C. C., 152; No. 4449 (Sub-No. 1), *Same v. Pennsylvania R. R. Co.*, 27 Ib., 152; and No. 4449 (Sub-No. 2), *Inland Steel Co. v. P. & L. E. R. R. Co.*, 27 Ib., 152.

Hearings were held in these cases as follows: No. 3854, at Washington, D. C., December 18-21, 1911, March 18-21, 1912, April 30-May 3, 1912, May 27-30, 1912; No. 4650, at Washington, April 22-24, 1912, May 20-22, 1912, and November 18, 1912; No. 4607, at Washington, May 27-28, 1912, June 4-6, 1912, and at New York City on June 29, 1912; No. 4449 and Sub-Nos. 1 and 2 at Washington, December 18-21, 1911, and March 18-21, 1912.

Arguments were had on the following dates: No. 4650, March 15, 1913; No. 4607, November 25, 1912; No. 4449, and Sub-Nos. 1 and 2, November 25, 1912, and No. 3854, on November 25, 1912.

While the latter group of cases was pending, counsel for complainants in the *Wickwire* case was advised that the Commission was delaying action in that case because of its connection with these other rate cases. It appeared to the Commission that if it should establish the rates on coke from Connellsville to Buffalo in advance of a decision in the other coke cases it would virtually decide the latter, because the rate from Connellsville to Buffalo is one rate in a system of related rates. It did not appear wise and just to the Commission to permit the individual Connellsville-Buffalo rate practically to determine all the related rates. When counsel for complainants was advised of this situation, he expressed the desire that his case be determined without reference to the other cases, in the view that the method of procedure contemplated by the Commission might deprive his clients of the kind of hearing which is guaranteed under the act. It may be noted in this connection that although it would seem that complainants had full knowledge of the other coke rate cases and of their relation to the Buffalo case, no effort was made by them at any time formally to intervene or in any other manner to participate in the proceedings.

The Commission considered the related coke cases with the greatest care in all their details, and as a result the rate of \$1.85 to Buffalo was declared not to be unreasonable.

Following the decisions in these cases counsel for complainants in the *Wickwire* case petitioned for a rehearing. This petition specified a number of alleged errors in the Commission's decision of May 29 and asked that the case be reopened for further evidence or for a rehearing. As shown by the petition filed, apparently complainants desired to submit evidence as to the effect of the increased rate of \$1.85 upon the pig-iron industry at Buffalo, as to the cost of manufacture as compared with their competitors, and as to the opportunity of remaining in markets which they had hitherto been able to reach in competition with other pig-iron producers; and, secondly, evidence in rebuttal of the Commission's conclusion that the rate of \$1.85 was a proper one in relation to the other rates from the Connellsville region. Feeling that the Commission should have the benefit of whatever criticism, additional testimony, and argument the counsel in the *Wickwire* case might offer with reference to its decision, the petition for rehearing was granted.

The case was set for rehearing at Buffalo on November 19, 1913, before a member of the Commission. Some time prior to the date of the hearing, however, counsel for complainants advised the Commission that he and his associates had examined the record in the case, and that they had come to the conclusion that there was no evidence which they desired to offer at the proposed hearing, and consequently desired to have the *Wickwire* case reassigned for argument without further testimony, and for the filing of briefs. This course was assented to by counsel for defendants and the Commission, and the case was eventually reargued on January 9, 1914.

It appeared from the briefs and the argument that complainants' counsel had decided, first, that the suggested evidence as to the cost of production was not relevant, and that in general they felt content to have the question whether the carriers had sustained the burden of proof determined, so far as the evidence was concerned, upon the original record. Complainants' present position is in short that there was no proof in the original proceeding upon which a decision in favor of the carriers could be sustained; that the proof offered by the defendants did not sustain the burden imposed upon them by the amendment of 1910 of justifying the increased rate; and that the Commission in

deciding that the increase of the rate was justified went outside of the record in violation of the complainants' rights.

That portion of the Commission's report to which complainants' allegations of error are now principally directed is the concluding paragraph, which reads as follows:

"The adjustment made by the carriers tends to lessen the discrimination against eastern Pennsylvania furnaces. Furthermore, the rate to Buffalo is one rate in a large rate structure which embraces the great industrial territory in the United States. We can not, in fairness to other localities, isolate this rate and ignore all others. It yields a revenue of 5.44 mills per ton per mile. This is somewhat higher per ton per mile than the rate to Chicago, for instance, but considerably lower per ton per mile than the rate to numerous other points. The rate of \$1.85 fits into the coke-rate map as reconstructed by us in a group of cases, of which this is one, and all of which must be considered together. We have given most careful consideration to all the aspects of the question before us, and we are constrained to hold that the rate under attack is not unreasonable. The complaint must be dismissed."

The decision, it will be observed, rests on two grounds which in general are of the same nature, namely, a comparison of rates; that is, a comparison of the rate in controversy, the Buffalo rate of \$1.85, first, with the rates from the Connellsville region to the eastern Pennsylvania furnaces, and, secondly, with the rates to other coke consuming points which use Connellsville coke. Complainants admit, as a general proposition, that rates may properly be judged by comparison with other rates, but contend that the comparisons in the present case were improper for reasons which now will be discussed.

It was stated in the decision that in comparing the controverted rate with the rate to eastern Pennsylvania furnaces the adjustment made by the carriers in establishing the \$1.85 rate tended to lessen the discrimination against eastern Pennsylvania furnaces that existed under the old rate structure. Earlier in the report reference was made to testimony for the defendants that the rate was advanced from \$1.65 to \$1.85 because the \$1.65 rate for the haul to Buffalo compared with the rates from the Connellsville region to various eastern Pennsylvania furnaces had seemed to be unreasonably low and had consequently led to a vigorous protest from the Eastern Pig Iron Association; and that it was to meet this protest and to put the rate to Buffalo on the

same relative basis that the increase had been made, the allegation being, however, that, even with the increase, the Buffalo rate was still on a substantially lower basis than the other rates mentioned.

Complainants now contend that such evidence offered by the carriers could not justify the increase, and moreover that such an issue, discrimination, was one which could not and should not have been considered in such a proceeding as the *Wickwire case*. They take the same position regarding the Commission's consideration of the relation of the Buffalo rate to the other coke rates, describing this as an effort, improper in such a proceeding, to adjust the differentials between the various consuming points. The following discussion will have reference principally to the objection that the issue of discrimination can not be considered.

While pointing out that the rate in this case was not actually suspended, their protest having been made after it had become effective, complainants argue that the case is in principle the same as one under section 15 of the act, relating to a suspended schedule proposing an increase of rates, and that as the rate was increased subsequent to January 1, 1910, the burden of proof is upon the carriers. There can be no difference of opinion regarding this proposition as to the burden of proof. Complainants argue further that in such a proceeding the act itself fixes the issue, and that this issue is *solely* whether the increased rate is just and reasonable; that is, it is an issue under section 1 of the act, and the Commission may not consider an issue of discrimination or the matter of differentials. This contention is rested on the concluding portion of the second paragraph of section 15, which reads as follows:

"At any hearing involving a rate increased after January 1, 1910, or of a rate sought to be increased after the passage of this act, the burden of proof to show that the increased or proposed increased rate is just and reasonable shall be upon the common carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

The foregoing is the proposition as argued by complainants' counsel at the reargument. In complainants' opening brief it appears in a somewhat modified form to the effect that an increased rate can not be justified on the theory of "equalization" of rates to competing points nor to avoid a violation of section 4 of the act. In support of the contentions thus made the Com-

mission is cited in three cases, *In the Matter of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio and Others*, 22 I. C. C., 604, 612; *Coal Rates to Davenport, Iowa*, 26 I. C. C., 140, and *California-Nevada Lumber Rates*, 28 I. C. C., 313.

With the contention that an issue of discrimination in the sense of preference and prejudice under section 3 of the act can not be considered in a proceeding relating to a rate increased since 1910 we are unable to agree. Considering that portion of section 15 relating to new schedules, which, as already indicated, was invoked by complainants in argument, it will be noticed that the act provides:

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare . . . the Commission shall have, and is hereby given authority, either upon complaint or upon its own initiative without complaint . . . to enter upon a hearing concerning the propriety of such rate, fare, charge, etc. . . ."

Surely such a term as "propriety" does not limit the Commission to considering only the reasonableness of the rate without reference to other considerations entering into its propriety. This term seems comprehensive enough to cover all the considerations entering into a rate, such as its reasonableness *per se*, its relative reasonableness, or its preferential or prejudicial character. Complainants' attempted limitation of the meaning of the act is rested on the provision as to burden of proof quoted above, which follows the portion of section 15 last quoted. This provision would seem to mean, both from its language and from its position in the paragraph, simply that when the new rate is an increased rate, as to one issue only, namely, whether it is just or reasonable, the burden of proof shall be on the carrier. While it may be conceded that when the rate is an increased rate this particular issue is one necessarily and unavoidably a part of the case, it does not follow that it must be the sole issue. Even though the Commission in the case of an increased rate always is to consider whether it is just and reasonable, it is not precluded from considering the rate from other viewpoints, such as that of its preferential or discriminatory character. In view of the general import of the language of the paragraph taken as a whole, to argue the contrary would seem to be to torture the plain meaning of the act into a restricted sense in nowise necessarily inferable from its terms.

Passing to the practice under this section, it is the fact that it

is the Commission's custom to suspend new rates when it appears from protest or check of the tariffs that they will create unlawful discrimination. Many tariffs have been suspended solely for this reason. Some tariffs providing for reduced rates to many points and not publishing a single increased rate have been suspended solely upon the ground of discrimination. Moreover, the Commission has in investigation and suspension proceedings decreed the cancellation of suspended tariffs because the rates proposed therein were found to create unjust discriminations. *In the Matter of Advances in Charges for Switching Ice at Chicago*, 24 I. C. C., 660. Surely it is also open to the Commission to consider as a part of the test of the propriety of the new rate the circumstance that it will eliminate a discrimination existing under the adjustment which it is to supersede. This is not to say that the consideration as to whether the new rate effects or eliminates a discrimination can be urged in sole justification of the rate. A new increased rate might eliminate discrimination and yet be condemned for being unreasonably high. The fact, however, that it does eliminate discrimination should be given some weight in determining its propriety.

It may be remarked that while in view of its peculiar circumstances we have been satisfied to discuss the instant case on the general principles applicable to suspended schedules proposing increases in rates, it is not in reality just such a case. As stated above, the increased rate had gone into effect and was subsequently attacked upon complaint by petitioners herein, which as well as the act, must be considered to fix the issues. This complaint itself raised several issues of discrimination; one, that the \$1.85 rate was discriminatory as compared with the rates enjoyed by complainants' competitors in the Gary and Pittsburgh districts; and the other, that it was discriminatory as compared with the rate to eastern Pennsylvania furnaces. This latter is both in fact and as a matter of law the very issue of discrimination which complainants now protest should not have been considered, except that complainants' original petition asserted that the \$1.85 rate created or perpetuated the discrimination rather than eliminated it. With this allegation in their complaint it is difficult to discover a basis for complainants' assertion that the issue of discrimination was not in the case, and that the evidence which indicated that the discrimination lay the other way was not relevant.

We do not believe that the cases cited by complainants' counsel

are inconsistent either with the Commission's practice or the interpretation of the law stated above. We are of opinion that the extracts from the decisions quoted by counsel, when considered in connection with the peculiar facts in the cases in which the statements were made, do not enunciate general principles prohibiting the consideration of the Buffalo and eastern Pennsylvania adjustment or the relation of the Buffalo rate to the other coke rates. *In the Matter of Advances in Rates for the Transportation of Coal by the Chesapeake & Ohio and Others, supra*, was a case in which the Norfolk & Western, the road which made a defense, and the protestants submitted elaborate compilations of data upon earnings and costs to measure the inherent reasonableness of the rates from the West Virginia coal fields there in question. The defense of the Norfolk & Western was rested upon this consideration and disclaimed any intention to justify the West Virginia rates upon the theory of their relation to the rates from the Pittsburgh fields. This circumstance should be borne in mind in the consideration of expressions in the opinion as to the irrelevancy of the motives which led to the making of the increased rates and the policy they were designed to effect. Note should also be taken of the following statement in the opinion which is made at the conclusion of that portion, dealing with the irrelevancy of the adjustment between the Pittsburgh and the West Virginia fields, now relied upon by complainants' counsel in support of the proposition that only the justness and the reasonableness of the rates themselves are to be considered:

"In saying this, however, regard must be had for those provisions of the law which expressly declare certain fundamental policies of regulation. There may not be discrimination between localities, it is said in section 3; and in section 4 this principle is extended so as to prohibit the farther point being given an undue advantage over that which is nearer the point of origin."

The "equalization" discussed in the Chesapeake & Ohio case was one between two different coal fields served by different groups of lines, which is a very different proposition from the discrimination discussed in the instant case predicated upon the maintenance of a different basis of rates by one road or set of roads serving two competing points. The latter is a case which falls within section 3; the former is one which obviously does not. In *Coal Rates to Davenport, Iowa*, 26 I. C. C., 140, the ground in brief for holding that the proposed increase of rate was not justified was that the comparison of rates adduced by the carriers

did not show that the proposed rate was reasonable. Rates selected from this comparison showed that on the consideration of distance the proposed rate was too high. As to the statement in the opinion, now relied upon by counsel, that "we can not in such a proceeding as this undertake to adjust relative rates from different groups," there is nowhere in the opinion any suggestion that the Commission felt constrained not to undertake the adjustment mentioned because the act prohibited such a course. A variety of reasons may be suggested for the stated impracticability of then considering this adjustment; for example, that all the rates at the time of the decision were not before the Commission: that the problem of the adjustment had been raised in an independent proceeding then pending, which under the circumstances promised the most convenient means of adjudicating it. Such considerations, whether as a matter of practice consistent or inconsistent with the course of procedure in the *Wickwire* and related cases, have in them nothing of the nature of a general rule which might be invoked in alleged similar cases. In *California-Nevada Lumber Rates*, 28 I. C. C., 313, the opening portion of the opinion reads:

"These class rates (the proposed rates) amount to \$5.40 per ton and are so high that no contention is made that they should be regarded as reasonable."

This statement alone is sufficient to distinguish that case from the instant case. Under this conclusion that the proposed rates were unreasonably high, manifestly the fact that they had been published to remove a rate factor indicating a violation of the fourth section could not be accepted as a justification for the change.

It may be said in general that the error of counsel in the citation of these cases seems to be in taking statements as to the inadequacy or irrelevancy in particular cases of certain matters of defense there urged and concluding therefrom that such matters should be given no weight whatever in any proceeding irrespective of the course or weight of all the proof.

We are of opinion, therefore, that it was with entire propriety that our decision as to the justification of the proposed increase was rested in part on the consideration that the increased rate rather than the rate which it superseded appeared to be on the proper relative basis when compared with the rates to eastern Pennsylvania furnaces and consequently eliminated a discrimination which inhered in the old Buffalo rate. This conclusion

was checked and confirmed by the further conclusion, upon which the decision mainly rests, that the increased Buffalo rate seemed to be just and reasonable when compared with the rates to other coke-consuming points considered by us in the related coke cases. This latter comparison appears to be the "adjusting of differentials" criticized by complainants. It would seem, however, that it is in essence simply a determination of the reasonableness of the various rates in question by comparison with the other related rates. That such a method may be employed in any proceeding before the Commission regarding the reasonableness of a rate can not be validly questioned.

Complainants argue, however, that this particular comparison was inadequate to sustain the burden of proof resting on the defendants or to support the Commission's findings as to the reasonableness of the increased Buffalo rate for the reason that such comparison can be made only upon evidence and proof of a similarity of transportation conditions. They say that there was no such evidence of similarity in the record and now aver in argument that the conditions were quite dissimilar. They point to the rates to Toledo and to Reading, where the distances are similar to the Buffalo distance and the rates are the same. In the case of Toledo they aver that there is practically no coke traffic while the traffic to Buffalo is very heavy, and argue that this difference in the density of the traffic should have been taken into consideration in fixing the rates. In the case of Reading they argue that there is a manifest difference in transportation conditions in that the haul from the Connellsville region to Reading is over the Allegheny Mountains, while to Buffalo it is at water level all the way.

The proposition to which counsel's argument tends, that no comparison of rates is ever justified except upon the actual submission of evidence of similarity of the various circumstances and conditions of transportation, would seem to be a somewhat extreme one. It is well known that rates have been frequently justified or condemned by this Commission upon records containing little else than mere rate and distance comparisons; under the condition, however, of a known general similarity of conditions, as for example where the movements compared are of the same commodity in the same territory. Granting, however, that there is some dissimilarity of conditions in the various movements involved in this and in the other related coke cases and that the differences now remarked by counsel are of a kind to influence

the amount of the rates in question, we may say that, without attempting to assign the precise weight which should be given to these differences, we feel confident that they do not sustain a valid criticism of the Buffalo rate, which we have approved. The rate of \$1.85 to Buffalo is not only not unreasonably high, but on the contrary is low when compared with the present rates to eastern Pennsylvania furnaces. It is also low as compared with the other rates determined to be reasonable by this Commission in the related coke-rate cases. A recent examination of the comparison has served only to strengthen this conclusion. Measurement of these rates by an arbitrary measuring rate computed from the rates themselves shows that the Buffalo rate, even using the distance of 314 miles urged by complainants, is still somewhat out of line with the other rates and might, if established solely upon the distance basis, which we do not suggest, be put as high as \$1.94 rather than \$1.85.

This leaves for consideration complainants' contention that in justifying the increased rate the Commission must have gone, and in fact, did go, outside of the record in the instant case to support its conclusion, and that in so doing it deprived complainants of the hearing guaranteed them by the act. In support of their asserted rights in this regard counsel cite *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S., 88, which holds that the statute gives parties a right to a full hearing and imposes upon the Commission the duty of deciding in accordance with the facts proved and holds, moreover, that information gathered by the Commission in the exercise of its jurisdiction conferred by section 12 of the act is not available where the party is entitled to a hearing. A brief answer to complainants' contention is that they were accorded a full hearing, that the Commission has decided in accordance with the facts proved and that it did not base its conclusion in the instant case on evidence introduced in the other coke-rate cases. As has already appeared in the foregoing portion of this report, what the Commission did was simply to refer to its conclusions in those other cases, or, in other words, it used the rates there found to be reasonable after extensive examination and most careful consideration as a measure of the reasonableness of the rate in the *Wickwire* case. This is quite in accord with our ordinary practice as shown for example in *Rates for the Transportation of Cooperage From Salt Lake City*, 24 I. C. C., 656, 659. To contend that the Commission could make no such comparison and that in deciding the *Wickwire* case

or any particular case of the group it was compelled to shut its eyes to all the other cases or to divide its mind into separate compartments and to consider each one without any reference whatsoever to the other, and this in the face of their unavoidably necessary relation, is a proposition which can not be seriously advanced.

A dictum in *United States v. B. & O. S. W. Ry. Co.*, 226 U. S., 14, 20, refers to this right of the Commission, to take notice of the results reached by it in other cases. The dictum, however, stipulates as a condition of this right that the facts thus noticed should be specified in the record in time for the parties to meet it if they can before the case is submitted, so that matters of law may be saved. This dictum is cited by complainants in their opening brief with the observation that in the present case nothing has been made to appear in the record as to the results reached in other cases and that a court would not be enabled to review the decision of the Commission in this regard. It is true that the Commission's decision does not specify with particularity the rates in the other coke-rate cases used as the standard of comparison. The Commission probably was betrayed into a lack of formality in this regard because of its consciousness of the familiarity both of the defendants and the complainants with the other cases which it had in mind. It assumed that both would quite clearly understand the reference to the other cases and would have easy access to the cited comparison. If the reference was, however, as a matter of record, too indefinite, it has now been corrected by the enumeration of the other cases in the preceding portion of this report and further cause of complaint in this regard would seem to disappear.

In conclusion we are of opinion that for the reasons indicated above complainants' allegations of error in the original decision in this case have not been sustained. Since no new evidence has been offered we can see no reason to depart from our original finding that the reasonableness of the rate of \$1.85 to Buffalo had been established. It follows that the complaint must be dismissed and it will be so ordered.

RIDGEWOOD COAL COMPANY *v.* LEHIGH VALLEY
RAILROAD COMPANY.

21 I. C. C. 183 (1911).

H. C. Reynolds for complainant.

J. F. Schaperkottler and *F. W. Wheaton* for Lehigh Valley Railroad Company.

REPORT OF THE COMMISSION.

CLEMENTS, *Chairman*:

Complainant is a corporation with principal offices at Scranton, Pa. By petition, duly filed, it asks that the Lehigh Valley Railroad Company be required under section 1 of the act to regulate commerce to accord it a switch connection with its coal mine some 8 miles south of Wilkes-Barre, Pa. The complaint also is drawn under section 3, and we are asked to determine the extent of alleged damages. The defense urged is that the connection is unsafe and that interstate traffic has not been tendered within the meaning of section 1.

The Buffalo-to-New York main line of the Lehigh Valley Railroad descends a mountainous grade between Fairview and Conway, Pa., the latter about 5 miles south of Wilkes-Barre. This 11-mile stretch is single tracked and is designated by defendant its "mountain track." Leaving Fairview, in order to overcome the vertical descent the track runs west to Newport, where it describes what might be termed a hairpin curve, the lower tangent retracing east through Conway to Wilkes-Barre and beyond. This lower tangent affords an unobstructed view for some 3,800 feet, when a slight curve leads to Conway. The Ridgewood breaker is situated about 1,650 feet east of the Newport curve and immediately south or on the ascending side of defendant's track; that is, between the upper and lower tangents. The pedestals of the breaker under construction are 59½ feet from the center of defendant's rails. To the north of the mountain track the descent continues into the valley. There is a block signal or semaphore about 210 feet below the proposed breaker. The average grade of the mountain track of about 96 feet to the mile obtains at the Ridgewood property.

Prior to November 8, 1888, all the Lehigh Valley's through

eastern and western traffic, both passenger and freight, passed over the mountain track, which thus largely contributed to the earning of a total revenue by the Lehigh Valley for that year of \$13,554,-884.04. On the date mentioned the first track of what is known as defendant's "mountain cut-off" as distinguished from its "mountain track," was opened between Gracedale, a short distance south of Fairview, and Avoca, 16 miles to the east. As the fiscal year for 1888 ended November 30, the revenue reported includes an operation of only three weeks of the one track of the mountain cut-off. Since completion of the second track of the mountain cut-off on December 21, 1894, the mountain track has been devoted as far as possible exclusively to passenger traffic, and at present there is daily but one fast freight each way and certain helper engines in addition to the passenger service. There are 9 first class passenger trains eastbound and 11 westbound every 24 hours.

Before construction of the mountain cut-off there were on the mountain track (in their order from Fairview) the Slocum, No. 7, and Newport sidings on the upper tangent, and the Espy Run and Warrior Run on the lower; also a lumber switch known as the Marcy siding. Disconnection of the Slocum, No. 7, and Espy Run switches, following a head-on collision on November 11, 1898, left only the Newport and Warrior Run; and these were changed from facing switches, or with the point up grade, to the trailing type in 1902 and 1904, respectively. The Newport connection was removed entirely in December, 1906. In the meantime (July, 1904) the Lehigh Valley Railroad had purchased the capital stock of the Warrior Run property, and later sold the property to the Lehigh Valley Coal Company, the stock of which is owned by the railroad; and simultaneously with removal of the Newport switch in December, 1906, it cleared the mountain track of all switches by extending the Warrior Run siding some 2.02 miles, at its own expense, to a point near Sugar Notch, half a mile beyond Conway. The grades of the Warrior Run, Slocum, and No. 7 sidings were about the same as at the proposed Ridgewood connection, while the Espy Run and Newport grades were a little less. It is not shown that a single accident on the mountain track can be attributed to the operation of switches and sidings during the entire period of its operation. It is shown that numerous switches and sidings in the anthracite region are constructed on grades, many of which are greater than the Ridgewood.

A block signal system was installed in 1896 on the down grade of the mountain track, which previous to that time had been operated without automatic signal device; the up grade was similarly equipped in 1900. The present staff system, which is separate from and additional to the block signal, was installed in September, 1909. The staff system, by the cooperative regulation required between the towermen at Fairview and Conway, mechanically closes the track to an opposing train, thus averting all collisions except possibly from the rear end.

The Ridgewood breaker is partially constructed, together with a siding to defendant's right of way. About 50 tons of coal have been mined and two cars shipped interstate via the Central Railroad of New Jersey after a wagon haul of a mile and a half. Further operations have been suspended because of an injunction obtained by the Lehigh Valley which in effect prohibits the hauling of materials across the mountain track and right of way. The testimony of engineers that 500,000 tons is a conservative estimate of the Ridgewood deposit is not seriously questioned, and the breaker under construction will be capable of releasing this tonnage at the rate of 300 to 500 tons, or about 10 carloads a day.

We find that complainant's siding has been constructed, application in writing made by complainant for a switch connection therewith, and interstate traffic tendered by complainant within the meaning of section 1 of the act; also that there is sufficient business to justify the construction and maintenance of the proposed connection. We further find from a careful examination of the evidence, including a study of plans which provide for derailing, interlocking, and other safety devices, that the proposed connection is "reasonably practicable and can be put in with safety." We shall make no finding or order with reference to alleged damages sustained. This is without prejudice to complainant to pursue such remedy as it may have in a court of competent jurisdiction. An order will be entered in accordance with these views.

Defendant has suggested an outlet by extension of the Ridgewood siding to connect with the Warrior Run siding to Sugar Notch, thus obviating a break in the mountain track. The distance would be practically identical with that of the Warrior Run extension, which the Lehigh Valley made at its own expense. Complainant insists that the contemplated cost of \$40,000 is prohibitive as to it, and that if this plan is preferred by the Lehigh Valley, that carrier should also bear the expense of this extension. While we make no finding with reference to this phase of the con-

troversy, defendant may as an alternative make this extension, provided we are advised of its intention in time to take proper action with reference to the present order.

MERCHANTS & MANUFACTURERS ASSOCIATION v.
CENTRAL RAILROAD COMPANY OF NEW
JERSEY *ET AL.*

30 I. C. C. 396 (1914).

John B. Daish and *A. C. Trippe* for complainant.

Arthur W. Rinke for Central Railroad Company of New Jersey.

Wm. L. Kinter for Philadelphia & Reading Railway Company.

Wm. A. Parker for Staten Island Rapid Transit Railway Company.

Thos. G. Smiley for Western Maryland Railway Company.

REPORT OF THE COMMISSION.

HARLAN, *Chairman*:

The complainant is an incorporated association with a membership composed of merchants and manufacturers of Baltimore. It demands that the Central Railroad Company of New Jersey and certain other carriers shall establish a through route and joint rates for the transportation of freight from Jersey City and New York to Baltimore, by way of Allentown and Gettysburg, in the state of Pennsylvania. It alleges that the defendants have neglected to establish such through route and joint rates in disregard of the obligations in that respect imposed by the act to regulate commerce. It alleges also that the joint class rates to Baltimore maintained by the defendants from Philadelphia and from Brills, a point in the state of New Jersey just west of Jersey City, are unreasonable and unjustly discriminatory; and the Commission is asked to establish just, reasonable and nondiscriminatory class rates between those points.

From 1895 to 1905 a through route between New York and Baltimore, with joint rates applicable thereto, substantially as now asked to be established, was maintained by certain of the defendants as follows: New York-Allentown, 90 miles, over the Central Railroad of New Jersey; Allentown-Harrisburg, 90 miles, over the

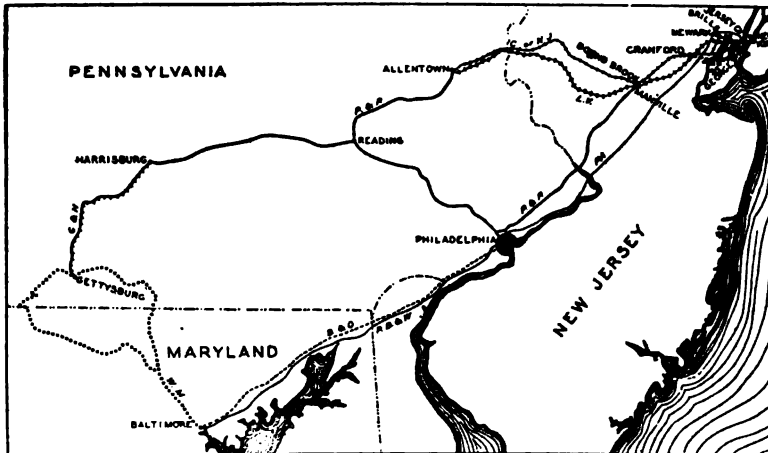
Philadelphia & Reading Railway; Harrisburg-Gettysburg, 46 miles, over the Gettysburg & Harrisburg Railway; and Gettysburg-Baltimore, 71 miles, over the Western Maryland Railway; a total distance of 297 miles.

For the greater part of the time since 1898 there have been in effect through routes by direct lines, with joint rates applicable thereto, between New York and Jersey City on the one hand and Baltimore on the other. Through routes and joint rates are now in effect over the following lines: (1) Philadelphia, Baltimore & Washington Railroad, Baltimore-Philadelphia; and Pennsylvania Railroad, Philadelphia-Jersey City and New York; (2) Baltimore & Ohio Railroad, Baltimore-Philadelphia; Philadelphia & Reading Railway, Philadelphia-Bound Brook, N. J.; Central Railroad of New Jersey, Bound Brook-Cranford, N. J.; and Staten Island Rapid Transit Railway, in connection with Baltimore & Ohio float service, Cranford-New York; (3) Baltimore & Ohio Railroad, Baltimore-Philadelphia; Philadelphia & Reading Railway, Philadelphia-Bound Brook; and Central Railroad of New Jersey, Bound Brook-New York; (4) Baltimore & Ohio Railroad, Baltimore-Philadelphia; Philadelphia & Reading Railway, Philadelphia-Manville, N. J.; and Lehigh Valley Railroad, Manville-New York; and (5) Baltimore & Ohio Railroad, Baltimore-Wilmington, Del.; Philadelphia, Baltimore & Washington Railroad, Wilmington-Philadelphia; and Pennsylvania Railroad, Philadelphia-Jersey City.

These routes vary but slightly in length, and average about 188 miles; the lines over which an additional route is sought are circuitous and the distance is about 110 miles greater. Moreover, the proposed route is not one over which through traffic would be likely to move in any great volume under normal conditions. Generally speaking it would require at least a day longer to move freight under joint rates from New York to Baltimore over such a route than by the direct lines.

The annexed diagram shows the lines of the existing routes, and also the lines of the proposed route through Allentown and Gettysburg. It is to be observed that the Central Railroad of New Jersey, the principal respondent, gets much shorter hauls under the routes to which it is already a party than the haul it would get under the proposed route if established; and if it had not joined in routes and rates over the direct lines, a question might have arisen whether it could be compelled to do so. The statute declares that the Commission shall not require any carrier without

its consent to embrace in a through route substantially less than the entire length of its line between the termini of such route, unless to embrace the entire length of its line would make such route "unreasonably long" as compared with some other practicable through route. But the Central of New Jersey, by voluntarily joining in two direct routes, has embraced very much less than the entire length of its line between New York and Baltimore; and in its answer to the complaint, it explains that the reason it does not publish joint rates through Allentown and Gettysburg is because the public interests would not be subserved by such a route. It avers that shippers are best served by joint rates over the direct lines; and it denies that there is any public demand for the addi-



tional route demanded by the complainant. Most of the other defendants refer to and adopt the answer of the Central of New Jersey.

The Western Maryland has filed no answer. A witness for that company testified that when the lines through Gettysburg were operated as a through route with joint rates it was customary to give second or third morning delivery on New York traffic at Baltimore, and the same delivery on Philadelphia traffic. He said he knew of no good reason why the old route and joint rates should not be re-established. The direct lines ordinarily make delivery of New York traffic at Baltimore on the first morning after shipment.

The complainant's contention for an additional through route and joint rates is based chiefly upon an alleged lack of facilities for handling package freight through the stations of the Baltimore &

Ohio and Pennsylvania lines at Baltimore. It is insisted that if the proposed route and joint rates were established the stations of the Western Maryland at Baltimore would be brought into service and additional terminal facilities would thus be provided. There is nothing of record to show, however, that any considerable volume of freight that now moves over the direct lines would be diverted to such circuitous route.

The complainant's evidence is to the effect that for three or four months following September 1, 1913, there was some congestion of traffic at the Baltimore & Ohio and Pennsylvania terminals in Baltimore. It seems, however, that the probable cause of this congestion was the withdrawal by those lines on the date named of the so-called store-door delivery service which had theretofore been maintained by them for many years, and which embraced, with a few exceptions, the first three classes of freight. Baltimore merchants, within certain prescribed limits, had become accustomed to have their package freight delivered at their store doors; and the sudden withdrawal of the service naturally produced confusion and resulted in delays which for a few months were of a serious nature. The situation had greatly improved, however, at the time of the hearing of this case, though it was said that deliveries were not yet as promptly made as under the former service. As the merchants are becoming accustomed to the changed conditions, congestion is less marked and delays are less frequent; and there is nothing in the record seriously to suggest that the congestion may not be entirely eliminated within a reasonable time under improved terminal facilities and proper warehousing rules. There is no reason why congestion or confusion should result from deliveries, at adequately equipped stations or warehouses, to drays belonging to or employed by the merchants, any more than from deliveries to drays employed by the railroads.

Whether future congestion would be prevented by an additional route and joint rates over circuitous lines is entirely conjectural. Several witnesses for the complainant expressed the view that the situation would be improved; but the sole basis of that view was that with the new route the terminals of the Western Maryland would be made available for handling freight. It was said that under the former through route and joint rates the Western Maryland for a time carried daily about 50,000 pounds of package freight westbound, and from 20,000 to 30,000 pounds eastbound; but this was at the time of the great Baltimore fire of 1904 when the terminals of the other roads were in disorder. From the evidence of

record we are not convinced that an additional route with joint rates over the circuitous lines would insure the handling of any considerable volume of freight through the Western Maryland terminals at Baltimore.

There is a through-car service for merchandise freight from New York to Baltimore over one or more of the direct routes, and the cars move in through trains. It is not seriously contended that such a service could be successfully maintained through Gettysburg, nor does the record suggest that there would be sufficient traffic to justify an effort to that end.

It was testified by the traffic manager of the complainant that this proceeding is the outgrowth of the discontinuance of the store-door delivery. He stated that in the investigation of that matter it was discovered that a former route through Gettysburg had been closed to traffic from New York, and it was then decided to ask that such route be reestablished. It does not appear that there was any congestion of traffic at the stations in Baltimore prior to September 1, 1913, or that Baltimore merchants were subjected to inconvenience by the closing of the Gettysburg route in 1905.

The Baltimore & Ohio and Pennsylvania roads are responsible for the conditions of their terminals at Baltimore, and if their terminals are not sufficient to insure the prompt delivery of traffic they should be made so. It is not contended that the service under the existing through routes and joint rates is otherwise inefficient.

It is well settled that even though through routes and joint rates may exist between two points, this Commission has the authority to establish additional routes and to prescribe just and reasonable joint rates to be applied thereto. But the grant of this authority contemplates the exercise of judgment upon the facts disclosed. The right and duty rest with the Commission to establish or decline to establish additional routes and joint rates as the circumstances and conditions may in its judgment appear to require. *Flour City S. S. Co. v. L. V. R. R. Co.*, 24 I. C. C., 179, 185; *Wichita Falls System Joint Coal Rate case*, 26 I. C. C., 215; *Waverly Oil Works Co. v. P. R. R. Co.*, 28 I. C. C., 621, 629-630; *Truckers Transfer Co. v. C. & W. C. Ry. Co.*, 27 I. C. C., 275, 277; and other similar cases.

Upon the evidence of record, considered in the light of the cited cases, the question is whether the public interests require a through route with joint rates between New York and Baltimore, over the circuitous lines referred to, in addition to the several existing

through routes over the direct lines. In our judgment this question must be answered in the negative. The prayer of the complaint in this respect must be denied.

IN THE MATTER OF FREIGHT BILLS.

29 I. C. C. 496 (1914.)

Robert E. Quirk for Interstate Commerce Commission.

REPORT OF THE COMMISSION.

HARLAN, Commissioner:

Numerous informal complaints as well as our general experience with the matter having given us reason to believe that the carriers have failed to establish, observe, and enforce just and reasonable regulations and practices affecting the issuance of freight bills and receipts, this investigation and inquiry was instituted by the Commission on its own motion. Its purpose was to determine whether the present rules, regulations, and practices of carriers in regard to freight bills embrace any unjust, unreasonable, discriminatory, preferential, or otherwise unlawful features, and to determine more particularly whether freight bills or receipts, when presented to the consignee, should show on their face information respecting the shipments covered thereby as follows:

(1) The point of origin; (2) the date of shipment; (3) the weight of the shipment; (4) the route, including the name or initials of each carrier participating in the haul and the junction points through which the shipment moved; (5) the initials and number of the car; (6) an adequate description of the property transported; (7) the rate or rates applied for the service; (8) a statement of the nature, amount, and point of accrual of each item of charge for stop-in-transit, reconsignment, switching, car service, storage, and any other charge incident to the transportation; (9) the name of the consignor and the date of arrival at destination.

Freight bills may be said to have three functions, namely, (a) to serve as a receipt to the consignee or consignor and as prima facie evidence of the payment of the transportation charges; (b) to serve as a receipt to the carrier and as prima facie evidence

of the delivery of the property; and (c) to serve as a notice to the consignee of the arrival of the shipment. In addition to these defined functions the freight bill has other uses. It is often a means of identifying the shipment, and to this extent the name of the shipper is frequently essential in effecting prompt delivery. It is also used extensively as a record. The purpose of the inquiry was to ascertain whether in any of these respects the present practices of carriers are defective and have any unlawful consequences and, if so, to take such action as might be authorized by law for the establishment of other and more perfect rules and regulations respecting the form and use of freight bills.

Shortly after the order of inquiry was entered, the Commission was advised that the carriers themselves, through the American Railway Association and the Association of American Railway Accounting Officers, and for the purpose of arriving at an understanding as to an improved form of freight receipt, had voluntarily taken up the matter with shippers represented by the National Industrial Traffic League and with others. As the result of these joint deliberations and of informal conferences between the Commission and these representatives of carriers and shippers a standard form of freight bill has been agreed upon and is now presented to the Commission for its action. The form is so prepared as to require carriers to show all the information suggested for consideration in the order instituting the inquiry.

No question has been made of the right of the Commission under section 20 to prescribe by proper order the form and substance of freight bills and require their use by carriers. But in view of the apparent general consensus of opinion among both carriers and shippers as to the information that ought to appear on a freight bill we think it will suffice at this time simply to express our approval of the proposed form, and also to say that we think it a proper form and one that carriers should at once adopt. It is obviously the duty of carriers in rendering a bill for transportation service to state thereon such information as will enable the consignor or consignee with the aid of the published tariff to verify the correctness of the charges which he is called upon to pay. A freight bill should also show the point of origin, the date of shipment, its weight, the route of movement (this being shown by indicating each carrier participating in the haul and the junction points through which the shipment moves), the initials of the owning carrier and the number of the car, an adequate description of the property carried, the rate or rates applicable to the

service rendered, and a statement of the nature, amount, and points of accrual of each item or charge for stoppage in transit, reconsignment, switching, drayage, car service, storage, or other charge incident to the transaction. We are convinced that the adoption by all carriers of such a form will go far toward establishing uniformity, simplicity, and certainty, and that its general use will remove much of the confusion now existing and will minimize the irregularities and injustices which have heretofore occurred.

There is one feature in the situation that requires some consideration and which apparently was not discussed in the conferences between the shippers and the carriers. We refer to that clause in section 15 of the act which makes it unlawful for a carrier to disclose any information concerning —

“the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such carrier for interstate transportation when that information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor.”

In *Conference Ruling 356* we held it to be unlawful for a carrier to disclose to the shipper the name of the ultimate consignee of a shipment reconsigned in transit by the original consignee. Certain large shipping interests, upon the record before us, contend that it is also unlawful for a common carrier to disclose to the ultimate consignee the name of the original consignor of a shipment reconsigned in transit by the original consignee. If we stand upon the precise language of the clause above quoted, it is not altogether clear that the law is definite enough to justify the latter construction; but in *Albree v. B. & M. R. R.*, 22 I. C. C., 303, 321, we have broadly held that the act indicates an intent upon the part of the Congress to secure to every shipper immunity from a disclosure of his business at the hands of a common carrier. We still regard this as a sound view of the law and as the construction to which carriers should adjust their practices.

The form agreed upon in the conferences between the carriers and shippers as above explained, and which we now approve, is shown on the opposite page.

We earnestly recommend the use by all the rail lines of the form here approved, but we shall hold the record open for further investigation upon the suggestion of the carriers or shippers affected by it and for such further action as may appear advisable.

FREIGHT BILL.

.....STATION.....191...

CONSIGNEE.....FREIGHT BILL No.....

DESTINATION.....

ROUTE.....

(Point of origin to destination.)

To ————— R. R. Co., Dr., for charges on articles transported:

WAY-BILLED FROM	WAY-BILL DATE AND No.	FULL NAME OF SHIPPER.	CAR INITIALS AND No.			
POINT AND DATE OF SHIPMENT.	CONNECTING LINE REFER- ENCE.	PREVIOUS WAY-BILL REFERENCES.	ORIGINAL CAR INITIALS AND No.			
NUMBER OF PACKAGES, ARTICLES AND MARKS.		WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Size: 53 x 81 inches NOTE: — This freight bill is spaced and ruled for type-writer use but can be readily adapted to use with indelible pencil. When to be used with pencil, horizontal lines may be added if considered desirable.						
*TOTAL PREPAID \$.....						

RECEIVED PAYMENT191.. TOTAL,.....

.....AGENT

* For use at junction points on freight subject to connecting line settlement.
[On reverse of freight bill.]

RULES.

1. This form must be prepared with typewriter, pen, or indelible pencil; all information called for to be shown in full and in a clear and legible manner.
 2. Weight, rate, and charges must be shown in detail for less carload shipments.
 3. Demurrage, switching, icing, or other miscellaneous charges not included in the rate for transportation must be stated in detail, and the points at which such charges accrued shown.
 4. When charges are assessed on track scale weights, gross, tare, and net weights on which charges are based and name of weighing station must be shown.
 5. The route over which the shipment moved from point of origin to destination, including the initials of each carrier and name of each connecting line junction point, must be shown.
 6. Overcharges will be refunded only on presentation of original paid freight bills.
 7. Original paid freight bills should accompany claims for overcharge, loss, or damage.
 8. All freight will be subject to demurrage or storage charges, or both, as provided in published tariffs.
- Accountants' Association Standard Form 123 (revised 1913).

BAER BROTHERS MERCANTILE COMPANY *v.* DENVER
& RIO GRANDE RAILROAD COMPANY.

233 U. S. 479 (1914).

The facts are stated in the opinion.

Mr. William B. Harrison for plaintiff in error.

Mr. E. N. Clark, with whom *Mr. Joel F. Vaile* and *J. G. McMurry* were on the brief, for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

In proceedings before the Commerce Commission the plaintiff secured an order requiring the defendant to pay it \$3,438.27 as reparation for unreasonable freight-rates charged and collected, the fixing of a new and just rate being left for future decision. The carrier failed to make the payment required and the plaintiff thereupon brought suit and recovered judgment for the sum awarded together with interest and attorneys' fees. This judgment was reversed by the Circuit Court of Appeals, which held

that the order was void on its face and could not be the basis of a recovery for the reason that, while reparation had been awarded on the ground that the old rate was unreasonable, the Commission had not fixed a new and just rate for the future.

1. That the two subjects of Reparation and Rates may be dealt with in one order is undoubtedly true. *Texas & Pac. Ry. v. Abilene*, 204 U. S. 426, 446. *Robinson v. Balt. & Ohio R. R.*, 222 U. S. 506, 509. But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its *quasi-judicial* capacity to measure past injuries sustained by a private shipper; the other, in its *quasi-legislative* capacity, to prevent future injury to the public. But testimony showing the unreasonableness of a past rate may also furnish information on which to fix a reasonable future rate and both subjects can be, and often are, disposed of by the same order. This, however, is not necessarily so. Indeed, under the original Commerce Act, the two matters could not possibly be combined in a single order for the reason that, while at that time the Commission could order the carrier to desist from unreasonable practices and award damages, it could not fix rates. This brought about an anomalous state of affairs. For if the shipper obtained his order of reparation because of unreasonable charges which the Railroad Company was ordered to discontinue, a slightly different, but still unreasonable, rate might be put in for the future, which the shipper had to pay and again institute proceedings for reparation. Section 15, act of February 4, 1887, c. 104, 24 Stat. 379, 384.

2. This situation was dealt with by the Hepburn Act, which, in addition to the existing power to make reparation, conferred upon the Commission the new power to make rates for the future. But the two matters were treated as different subjects and were dealt with in separate sections. Section 4 conferred the power of making rates. Section 5 gave the Commission power to make reparation orders. Sections 4, 5, act of June 29, 1906, c. 3591, 34 Stat. 584, 589, 590. Not only were the two functions separately treated, but an analysis of the act shows that there is no such necessary connection between them as to make the *quasi-judicial* order for reparation depend for its validity upon being joined with a *quasi-legislative* order fixing rates. Persons entitled to one may have no interest in the other. Persons interested in both may be entitled to reparation and not to a

new rate; or to a new rate and not to reparation. For example, § 13 (24 Stat. 383) permits "any mercantile, agricultural or manufacturing society or any body politic or municipal organization to make complaints against the carrier." On the application of such bodies, old rates might be declared unjust and new rates established, but, of course, no reparation would be given, for the reason that such complainants were not shippers and, therefore, not entitled to an award of pecuniary damages. Cf. *Louisville &c. R. R. v. Int. Com. Comm.*, 227 U. S. 88. Then, too, there are cases in which a rate, reasonable when made, becomes unreasonable as the result of a gradual change in conditions, so that no reparation is ordered even though a new rate be established for the future. *Anadarko Cotton Oil Co. v. Atchison &c. Ry.*, 20 I. C. C. 43. Conversely, there may be cases where what was an unreasonable rate in the past is found to be reasonable at the date of the hearing. In such a case reparation would be awarded for past unreasonable charges collected but no new rate would be established for the future.

3. It may, however, be said that even in such a case, the order while condemning the rate for the past, should contain a provision validating it for the future. But while this consideration might show that it was erroneous not to name the new rate, it would not follow that the order awarding reparation was void. The Hepburn Act treats the two subjects as related, but independent. The grounds of complaint may be joint or separate, and the very fact that they may sometimes be separate shows that the presence of both is not jurisdictional and that the absence of a provision for one need not operate to invalidate an order as to the other.

This conclusion is strengthened by considering the hardships that would result from nullifying a reparation order for error in omitting a provision for the future rate. It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public. The shipper might or might not intend to remain in business. He might or he might not be interested in future rates. He might have been able to prove unreasonableness as to the past without being able to furnish evidence as to what would be reasonable for the future. Or, the Commission might be in position to say with certainty that the rates had been unreasonable and award reparation accordingly, but it might require a

protracted and lengthy hearing to establish what would be just for the future. To make the shipper wait on such a finding and deprive him of his present right to reparation, until the determination of an independent question, would work a hardship not contemplated by the act and not required by any of its provisions.

The present case illustrates some of these features. The plaintiff's petition asked for reparation and that the Commission would establish just rates. On the hearing it appeared that there was no through route or joint rate and that the established local charge of one of the carriers was just while that of the other had not been established or included in a filed tariff and was also unjust. The evidence was sufficient to sustain a finding of damages against such carrier, but it did not show how the through rate should be divided between the two companies, one of which hauled 923 miles and the other 160 miles. The carriers did not ask for an extension of the time within which the reparation should be paid. The fact that they were given an opportunity to agree on a through rate and how it should be divided, ought not to deprive plaintiff of its rights to damages for the past, under a reparation order which could not, by any possibility, be changed by any subsequent finding as to rates for the future.

The Report and Order gave the plaintiff no preference over other shippers, since they showed that 15 cents of the rate charged by the Denver & Rio Grande was unreasonable. If such a finding of unreasonableness was not sufficiently general to inure to the benefit of all other shippers, they could, on application, have secured such a modification as to enable them to maintain a suit for the recovery of damages for unjust charges and collections in the past. So far as the future operation of the order was concerned, all shippers were left in the same position, where, from the necessity of the case, the old rate had to be paid until the time had elapsed within which a new and just through rate could be put into effect. But however desirable it may have been to deal with the entire matter at one time, the joinder of the two subjects was not jurisdictional. There was no such necessary connection between the two as to make the order of reparation void because of the absence of a concurrent provision establishing a rate for the future.

This conclusion makes it necessary to consider what judgment should have been entered by the Circuit Court of Appeals (*Baker v. Warner*, 231 U. S. 588). That necessitates an examination of the other assignments of error relied on by the Railroad Company.

4. The Denver & Rio Grande claimed in the record in the Court of Appeals that the order was void on its face for the reason that the Commission was without jurisdiction to pass upon the reasonableness of the rate from Pueblo, Colorado, to Leadville, Colorado. But while there was no through-rate and no through-route there was, in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation.

For "when goods shipped . . . from a point in one State to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the Act to Regulate Commerce." *Cincinnati, N. O. & Tex. Pac. Ry. v. Int. Com. Comm.*, 162 U. S. 184, 193. This common arrangement does not depend upon the establishment of a through-route or the issue and recognition of a through bill of lading, but may be otherwise manifested. *Ibid.*

That there was a common arrangement between the two carriers here was shown by the long-continued course in dealing, and the division of the freight, with the knowledge that it had been paid as compensation for the single haul. If there had been a failure on the part of one of the carriers to file the tariffs, that did not defeat the jurisdiction of the Commission to award reparation against that same carrier, when it was shown that its unreasonable charge of 45 cents per cwt. formed a part of the total rate of 90 cents per cwt. actually paid by the Baer Company.

The judgment of the Circuit Court of Appeals is reversed and that of the Circuit Court affirmed.

R. E. DOWNIE POLE COMPANY v. NORTHERN PACIFIC
RAILWAY COMPANY *ET AL.*

31 I. C. C. 142 (1914).

S. V. Carey for complainant.

L. B. du Ponte and *Charles Donnelly* for Northern Pacific Railway Company.

W. A. Robbins for Oregon-Washington Railroad & Navigation Company.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

R. E. Downie is engaged in the sale of timber products under the name of the R. E. Downie Pole Company, with principal office at Seattle, Wash. By complaint, filed April 1, 1913, he alleges that defendants' charges for the transportation in April, 1911, of one shipment of cedar poles from Redmond (Inglewood), Wash., to Rowena, Oreg., and of one shipment of cedar poles from Kenmore, Wash., to The Dalles, Oreg., were unreasonable, and asks reparation.

Kenmore and Redmond are local stations on the Northern Pacific Railway, 20 and 47 miles, respectively, from Seattle. Inglewood is not a station, but a loading spur at or near Redmond, which is the billing station. The Northern Pacific connects with the Oregon-Washington Railroad & Navigation Company both at Seattle and at Portland, Oreg., 185 miles south of Seattle. The shipments in question could have been routed either via the Northern Pacific to Seattle and the Oregon-Washington Railroad & Navigation Company beyond, or via the Northern Pacific through Seattle to Portland and the Oregon-Washington Railroad & Navigation Company beyond. There were, at the time the shipments moved, no joint through rates between these carriers in effect on poles from and to the points in question via either Seattle or Portland. The combinations of intermediate rates in effect at the time were: To and from Seattle, 18 cents from Kenmore to The Dalles, and 19 cents from Redmond or Inglewood to Rowena; and to and from Portland, 23 cents from Kenmore to The Dalles, and 25 cents from Redmond or Inglewood to Rowena.

The Northern Pacific refused to furnish its own cars for the

transportation of the shipments unless complainant would agree to route them via its line to Portland, thereby giving to the Northern Pacific a much longer haul than it would receive if the cars were delivered by it to the Oregon-Washington Railroad & Navigation Company at Seattle. Complainant desired to route via Seattle because of the availability of the lower combination. The Northern Pacific made request upon the Oregon-Washington Railroad & Navigation Company for cars for routing via that line from Seattle, and complainant waited for five days for the cars to be furnished, at the end of which time, the cars ordered not having arrived, he was compelled by the necessity of complying with the terms of his contract of sale of the poles to accept the conditions of the Northern Pacific, and accordingly received its cars and routed them via Portland at the higher aggregate through charge. This complainant did under protest.

The Northern Pacific admits that the proper route for this transportation was via Seattle, but contends that it could not be required to furnish its own equipment and accept a short haul thereon when the traffic could have been routed via a junction point that could have given it a longer haul.

The Northern Pacific invokes in justification of its refusal to furnish cars for movement via the route yielding it the short haul that restriction of the statute which provides that in establishing joint rates and through routes each carrier against which the order is made shall be given the benefit of the long haul via its own line "unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established." The limitation is unavailing as a defense in this case. We are considering not what we might do in the exercise of our authority to establish joint rates and through routes, but the lawfulness of the Northern Pacific's actions in respect of the application of rates which it had made available to the complainant.

The Northern Pacific did not restrict the application of its local rates on poles from Kenmore and Redmond to Seattle to intrastate traffic. It filed the tariffs naming those rates with this Commission, and in the absence of joint through rates between it and the Oregon-Washington Railroad & Navigation Company via Seattle was required, under section 6 of the act, to use them in constructing through rates on traffic through that gateway. That requirement carried with it the duty on the part of the Northern Pacific to furnish cars and to make suitable

arrangements with the Oregon-Washington Railroad & Navigation Company for the transportation beyond Seattle. Complainant was not concerned with the arrangements between the two carriers for furnishing equipment under the through rates which they offered for the through transportation via the different gateways.

We find that complainant made the shipments in accordance with the foregoing statement of facts. We further find that the action of the Northern Pacific in connection with the receipt and transportation of these shipments, as recited herein, subjected complainant to damages, measured by the difference between the aggregate rates paid thereon and the aggregate rates which would have been applicable had the shipments been routed via Seattle. Complainant is therefore entitled to reparation from the Northern Pacific on that basis.

Owing to the length of the poles three flat cars were used for each shipment. The shipment from Kenmore to The Dalles weighed 145,620 pounds, and the shipment from Redmond or Inglewood to Rowena 104,200 pounds. The total charges collected on the two shipments were \$598.67. Included in this amount is an apparent overcharge of \$3.25 on the shipment from Redmond or Inglewood. Including this overcharge, complainant is entitled to reparation on the two shipments in the sum of \$138.57, with interest from April 24, 1911, for which an order will be entered.

AMERICAN HAY COMPANY v. CENTRAL VERMONT
RAILWAY COMPANY *ET AL.*

30 I. C. C. 562 (1914).

Herbert Goldmark for complainant.

D. T. Lawrence and *M. S. Lynch* for Central Vermont Railway Company.

REPORT OF THE COMMISSION.

DANIELS, *Commissioner*:

The complainant, during the period covered by this controversy, conducted a hay business with its chief office in New York and operated in connection therewith a hay warehouse at St. Albans, Vt. Hay purchased north and west of St. Albans was brought

to that station and there inspected, assorted, graded, and sent on to market in the south.

In the conduct of this business the hay sometimes went through St. Albans without being taken from the car, the inspection being made by opening the car door without breaking bulk of car's contents; but ordinarily the hay was taken from the car, placed in the warehouse and sorted; afterwards the car was reloaded. When this process was followed, the hay put back into the car was not always identical with the hay taken from the same car.

When the hay was shipped into St. Albans, the complainant in all cases paid the local rate; but by the payment of a reconsignment charge of \$2 per car, complainant had the privilege on the outward shipment of the hay, whether the hay had or had not been unloaded, of sending the same, or an equal weight of other hay, to the desired destination at the balance of the through rate. The claim of the complainant is, that although entitled to the transit privilege, it was charged upon the particular carloads in controversy more than the through rate.

It appears from the testimony that, in case of the carloads involved, there was no joint through rate from the point of origin to the point of destination. The lowest combination was made sometimes upon Iberville, Canada, and sometimes upon Norwich, Conn. The complainant was charged upon the shipments in question the combination rate on St. Albans, which in the instance of these particular carloads was higher than that upon Norwich in some cases, and than that upon Iberville in other cases. It claims in this proceeding the benefit of the lowest combination.

It is a self-evident proposition that if the complainant was entitled to a through rate upon these carloads of hay, and if no joint rate was published, then the lowest available combination by the route over which the traffic moved should have been applied. This is not controverted by the Central Vermont Railway Company, hereinafter referred to as the defendant. Defendant denies that these shipments were in fact through shipments and entitled to the through rate. These shipments were in all cases locally billed to St. Albans and then billed out again locally from St. Albans. This procedure appears of record to have been in accord with explicit written directions from the complainant; and it is not denied by the complainant that the correct rate was collected if the shipments should have been treated as local shipments from St. Albans.

Though the complainant purchased nearly all of its hay at points other than St. Albans, and though, therefore, the greater part of the hay handled by it came into St. Albans by rail, yet it also purchased a small amount locally at St. Albans which was delivered to it by team. Upon such hay the transit privilege could not be accorded.

It further appears that outbound cars were checked against inbound cars, car against car. The credit arising on an inbound car was canceled when an outbound car entitled to transit privilege was despatched, even though the outbound shipment weighed less than the inbound shipment.

Under the rules of the defendant as applied at this time, credits on account of inbound billing could not be made available for outbound shipments unless used within a given time limit, and the testimony indicates that such credits were sometimes canceled on this account.

If the complainant desired to take advantage of the through rate with reconsignment privilege, the local usage required that he write "own billing" on the bill of lading. All the bills of lading reissued at St. Albans covering the cars in controversy bore the notation "new billing." The testimony of the defendant shows that the common understanding of the railroad and the complainant was that the term "new billing" signified that the car represented by the bill of lading was to be shipped out from St. Albans as if originating at that point. Upon this record, therefore, all these carloads were billed from St. Albans as though originating there instead of being billed out under the through rate, and this by express written direction of the complainant.

A considerable number of cars is involved. The complainant insists that, since only a small quantity of hay was purchased by it locally at St. Albans, and since its shipments were promptly handled at St. Albans and forwarded, and since outbound shipments were usually equivalent to inbound, credits for outbound billing must have existed under which these outbound carloads could move. One or two instances are shown where the outbound shipment was made in the same car in which the inbound shipment had arrived two or three days before; for these cars credits for outbound billing must have been available. But even though the complainant had such credits, it may have preferred to defer their use for subsequent shipments. However, it is established that the complainant, by its annotation of the shipping instructions, did empower the defendant to bill these shipments locally

from St. Albans. Had this been the result of inadvertence, a remedy might be found, but in the present case no evidence of mistake or oversight appears. It is therefore not unreasonable to impose upon the complainant the consequence of its deliberate action; and we must hold that these shipments from St. Albans were not through shipments, but local shipments, and that the correct rate has been applied.

There is surprisingly little evidence in the record as to the actual payment of the \$2 transit privilege. If such charge were paid by the complainant, and no direction incompatible with through routing were written by the complainant on the shipping directions from St. Albans, the carrier might be deemed on notice that the complainant wished the combination rate; but even though this \$2 charge were paid, if the shipper annotated the new shipping directions "new billing" the carrier was warranted in concluding that the shipper waived the privilege paid for as regards that particular car, and in billing said car at the local rate.

Assuming, however, that these shipments were local, and that the rates properly applicable were the local rate from point of origin to St. Albans and the local rate from St. Albans to destination, still the complainant insists that the charges exacted by the defendant were exorbitant for the reason that the rate into St. Albans was excessive.

These inbound rates vary with the point of origin, but were usually 18 cents per 100 pounds. This rate of 18 cents applied to St. Albans, and as a blanket from St. Albans to Norwich upon the south, 250 miles distant. The complainant urges that the rate to St. Albans was excessive, and that it should be awarded damages upon the basis of a reasonable rate. Upon the other hand, the defendant insists that the rate to Norwich was altogether too low and that the rate to St. Albans, all things considered, was not unreasonable.

These shipments moved from several points. A large number came from Pierreville, Quebec, and this point may be referred to by way of illustration. Pierreville is located upon the Quebec, Montreal & Southern Railroad, 90 miles from Iberville, its point of connection with the Central Vermont. The defendant stated that this Canadian railroad had but a small income, with practically no traffic except hay, and that at the rates in force it could hardly pay the expenses of its operation.

The distance from Pierreville to St. Albans is 132 miles. The

testimony shows that there is no loaded car movement from St. Albans to Pierreville, and that, therefore, the cars in which this hay is brought out must invariably be taken in empty. These carloads of hay were usually somewhat in excess of 20,000 pounds. The carriers, therefore, would receive for hauling the empty car from St. Albans to Pierreville, and the loaded car from Pierreville to St. Albans, about \$36. When the character of the line over which this traffic is handled for 90 miles from Pierreville to Iberville is considered, it can not satisfactorily be affirmed that this rate, considered in and of itself, was unreasonable.

The rate of 18 cents from Pierreville to St. Albans has since been reduced to 16 cents, and there have been slight reductions in some of the other rates involved in these inbound shipments. No case was, however, brought to our attention, and no instance is found from an examination of the exhibit of the complainant in which we are prepared to hold at this time and upon this record that the inbound rate was unlawful. The complaint, therefore, will be dismissed, and an order to that effect will be entered.¹

APPLICATION OF SOUTHERN PACIFIC COMPANY
UNDER THE PROVISIONS OF SECTION 5 OF THE
ACT TO REGULATE COMMERCE, AS AMENDED BY
SECTION 11 OF THE PANAMA CANAL ACT, IN CON-
NECTION WITH THE OPERATION OF THE PACIFIC
MAIL STEAMSHIP COMPANY.

32 I. C. C. 690 (1915)

F. H. Wood and H. C. Booth for Southern Pacific Company and
Pacific Mail Steamship Company.

REPORT OF THE COMMISSIONER.

CLARK, *Commissioner*:

This is an application under section 5 of the act to regulate commerce, as amended by section 11 of the Panama Canal act, filed by the Southern Pacific Company, hereinafter designated as the

¹ Reparation is based upon provable damages and does not follow, as matter of law, on proof of unjust discrimination. *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184. And see *Hormel & Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 30 I. C. C. 98. — Ed.

*S.Ct. held that there must be
actual damage for reparation.*

petitioner, in which the Commission is asked to determine: (1) The questions of fact as to competition or possibility of competition between the Southern Pacific Company and the Pacific Mail Steamship Company; (2) whether the proposed service of the Pacific Mail Steamship Company may, under the provisions of section 5, be lawfully operated; (3) whether such proposed service by water is, or is not, a service "through the Panama Canal"; (4) if it is not a service by water through the Panama Canal, whether it is of such advantage to the convenience and commerce of the people as to justify an extension of the time during which such service by water may continue to be operated beyond July 1, 1914; and (5) if said service by water may be continued, whether the steamship company must file schedules of its rates and practices, as required in said section.

SOUTHERN PACIFIC COMPANY.

The petitioner is a corporation organized and existing under the laws of the state of Kentucky. It controls and operates main lines of railroad extending from Portland, Oreg., to Sacramento, Cal.; from Ogden, Utah, through Sacramento to San Francisco, Cal.; from San Francisco through Los Angeles, Cal., and Houston, Tex., to New Orleans, La.; from Houston to Galveston, Tex. Petitioner also owns all the outstanding capital stock of the Southern Pacific Railroad Company of Mexico, a corporation organized and existing under the laws of the state of New Jersey. This company operates a main line of railroad extending from Nogales, Ariz., to and through Guaymas and along the southwestern coast of Mexico to Orendain, in the Republic of Mexico. This line has several branches, and at Orendain it connects with the National Railways of Mexico. At Nogales the Southern Pacific Railroad of Mexico connects with the main line of the Southern Pacific running from San Francisco to New Orleans. The distance, as shown by petitioner's time-tables, from San Francisco to Nogales is 1,049 miles, and from Nogales to Orendain 1,075 miles, making the total distance from San Francisco to the terminus in Mexico 2,124 miles.

Petitioner also operates steamship lines from the terminus of its railroad at New Orleans to New York City and to Havana, Cuba. From Galveston it operates a line of steamships to New York. Over these lines of railroad and steamships petitioner transports interstate and foreign commerce to and from San Francisco and vicinity. Petitioner also owns 110,800 shares, of the par value of

\$11,080,000, of a total of 200,000 shares, of the par value of \$20,000,000, of the capital stock of the Pacific Mail Steamship Company, hereinafter designated the steamship company.

PACIFIC MAIL STEAMSHIP COMPANY

This steamship company is a corporation organized and existing under the laws of the state of New York. It owns and operates two considerable fleets of steamships. One fleet operates between San Francisco, Cal., and Honolulu and ports in Japan and China, carrying interstate and foreign commerce from and to San Francisco. The other fleet operates between San Francisco and Balboa, the Pacific terminus of the Panama Canal, stopping at and serving various points on the southwestern coast of Mexico and Central America. The steamships on this line make regular scheduled trips, stopping at Mazatlan, San Blas, Manzanillo, Acapulco, and Salina Cruz, on the coast of Mexico, ports that are near to, and some of them directly served by, the Southern Pacific Railroad of Mexico. The traffic carried between San Francisco and Balboa has principally been transported over the Panama Railroad to or from Colon and via steamships bound for or from Atlantic coast points, Europe, and other foreign countries. The steamship company therefore has been a carrier of interstate and foreign commerce from and to San Francisco. Upon the oral argument counsel for petitioner asked leave to amend the petition so as to make it read that this fleet of steamers operates "between San Francisco and Balboa on the western coast of the Isthmus of Panama or Colon." Colon is at the eastern terminus of the Panama Canal. The reason assigned for this change is that the Panama Railroad has given notice that it will discontinue all commercial service between the Pacific and the Atlantic oceans, and in order to carry the traffic which it proposes to carry it will be necessary for the steamship company to land its freight at Balboa for transshipment or, passing through the canal, to land it at Colon for transshipment.

The petition alleges that —

"From and after July 1, 1914, the steamship company will engage (in addition to its Hawaiian-Asiatic traffic hereinbefore described) in traffic between San Francisco and the ports of San Blas, Manzanillo, Acapulco, and Salina Cruz, in the Republic of Mexico; Ocos, Champerico, and San Jose de Guatemala, in the Republic of Guatemala; Acajutla, La Libertad, and La Union, in the Republic of Salvador; Amapala, in the Republic of Hon-

duras; Corinto and San Juan del Sur, in the Republic of Nicaragua; and Punta Arenas, in the Republic of Costa Rica; between said ports above named, between said Mexican and Central American ports and Europe, and between said Mexican and Central American ports and Atlantic and Gulf ports of the United States, which said traffic with Europe and with the Atlantic and Gulf ports will be handled by the steamship company to or from Balboa and transshipped in connection with the vessels of other lines in no way connected with the petitioner. It will also engage in traffic between the port of Mazatlan, Mexico, and other Mexican and Central American ports above named and between Mazatlan and Atlantic and Gulf ports of the United States."

The following reason for this proposed change in the traffic is stated by the vice president of the steamship company:

"The Pacific Mail Steamship Company's idea is this: Under the law they can not operate from San Francisco to New York City; under the strict interpretation they can't operate from San Francisco and transfer a small quantity of freight at Colon or at Balboa in connection with European steamers for the reason that it might be considered that they were in competition with the Southern Pacific through the ports of New Orleans. * * * So that in making my report to the board of directors as to what I considered we could do under the act, I eliminated those two services — our business from San Francisco to Europe via the Isthmus of Panama and our business from San Francisco to New York via the Isthmus of Panama, I believing it was in direct violation of the terms of the act."

By resolution the stockholders adopted this recommendation. The steamship company proposes to continue as a common carrier of freight and passengers from and to the port of San Francisco, calling at the other ports named.

PRESENT AND POSSIBLE COMPETITION.

Section 5 of the act to regulate commerce, as amended by what is known as the Panama Canal act, among other things, provides that —

"From and after the 1st day of July, 1914, it shall be unlawful for any railroad company or other common carrier subject to the act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise,

either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense.

"Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier."

The language "does or may compete for traffic" and "possibility of competition" is strong and significant. Considering the whole act and its manifest purpose to dissociate railroads from competing water lines as described therein, these phrases evidently mean that one purpose of the inquiry by this Commission shall be to ascertain whether under existing conditions there is competition or whether there may be competition if the railroad interest in the water carrier or vessel is eliminated.

This section of the Panama Canal act indicates, among other things, a clear, unmistakable policy, adopted by Congress, to separate from railroad ownership, control, or influence such common carrier water lines, and such vessels, as may, when thus separated, compete with the present owning or controlling companies, except where, upon investigation, it is found by the Commission that the existing service by water, other than through the Panama Canal, is being operated in the interest of the public, is of advantage to the convenience and commerce of the people, and that its continuance will neither exclude, prevent, nor reduce competition on the route by water. This being so, a construction of the act must be adopted which will properly and effectively carry out the purpose of Congress. The Commission may not nullify or weaken the force of the plain intendment of the act for any reasons, however plausible they may appear to be. The words "may compete for traffic" do not mean a vague, possible though improbable competition, but mean a probable, potential competition, as when the water line is entirely divorced from the railroad. We must, therefore, look at the conditions as they will exist if this divorce is effected. From a practical view the question is, Will the steamship company,

when free to consult only its own interests, compete for traffic with the railroad line? In the light of experience this will not be a difficult question to determine in most cases. Self-interest will surely develop an effort to secure desirable traffic — traffic that will produce revenue for the carrier.

It must also be observed that the competition is "for traffic." There are no words of limitation in this clause; it covers all interstate coastwise or foreign traffic.

Possible competition for traffic in the present case will be considered under three heads: (1) Coastwise traffic between points in the United States; (2) traffic between San Francisco and ports on the coast of Mexico and Central America; and (3) European and the other foreign commerce.

COASTWISE TRAFFIC BETWEEN POINTS IN THE UNITED STATES.

It is frankly admitted that the steamship company, as an agent of interstate commerce, has been engaged in interstate coastwise traffic between points in the United States. It has received and carried freight between San Francisco and Balboa which was transported by railroad across the Isthmus of Panama and by ships to and from New York. The route of the steamship company forms the Pacific link in this through transportation. It is admitted that this service is or may be in competition with petitioner's lines of railroad and steamships from San Francisco to New York via New Orleans or Galveston.

But it is said in the petition and in the evidence submitted that the stockholders of the steamship company have determined not to accept freight from or to San Francisco to or from Atlantic coast points, and it is insisted that this should be accepted as a discontinuance of that service. It will be observed that by the proposed amendment to the petition the steamship company would operate its boats between San Francisco and Balboa or Colon, the termini of the Panama Canal; that they propose to operate as common carriers of freight. The question arises, Can the steamship company as a common carrier refuse to take any freight tendered between these points? If it can not, then whatever its intentions may be, interstate domestic freight may pass to and from these canal ports to and from San Francisco. The common-law rule controlling common carriers of this character, hereinafter referred to, requires them to accept all freight of the general character which they are carrying tendered to them at a port where

freight is received, to be conveyed to any port to which that character of freight is delivered. Common carriers may be compelled by mandatory writs to receive and carry lawful subjects of commerce. *M. P. R. R. Co. v. Larabee Flour Co.*, 211 U. S., 612; *L. & H. R. R. Co. v. Cook Brewing Co.*, 223 U. S., 70. Irrespective of this law we doubt the propriety and lawfulness of an endeavor on the part of the steamship company to avoid the operation of the act by voluntarily excluding from its legitimate business traffic between points at which its steamers touch, the carriage of which would be a violation of the law. Admitting that the stockholders of the steamship company have, in good faith, passed the resolution referred to, we fail to see how it could be carried out so long as the steamship company carries freight as a common carrier and receives and delivers freight at San Francisco to and from the ports at the termini of the canal.

But, as already stated, the act says "may compete"; that is, may compete if the railroad ownership is eliminated. Can it be insisted upon that this steamship company, if not controlled by the petitioner, would refuse to take freight at San Francisco for the canal ports or from the canal ports to San Francisco? Certainly the steamship company would "compete for traffic" of this character. There can be no reasonable doubt that steamships plying between New York, Honolulu, and the Orient, and not prohibited by law from engaging in coastwise traffic, would take on such freight at New York for the canal ports and receive such freight at the canal ports for New York. It should be observed also that this coastwise traffic does not affect simply the port cities. At each terminus the influence reaches back into the country. Traffic moves from the interior by rail to the port in order to secure the lower water rates, and at point of delivery is forwarded over rail routes to places in the interior. Unrestricted competition between water and rail lines has an effect upon a considerable territory in the vicinity of the termini of such lines. Competition, therefore, between the steamship company and the petitioner for this coastwise traffic would, if the steamship company were free from the railroad influence, be more or less potential. With, however, other steamship lines running through ships between San Francisco and New York, the amount of interstate coastwise traffic that would be offered the steamship company for transfer at a canal port would doubtless be negligible, as through ships can carry freight cheaper without such transfer and would in all probability meet any rate offered by others. It is stated in

this record that there are now at least three such through steamship lines. The record in hearings on *Fourth Section Applications Nos. 205 et al.*, 32 I. C. C., 611, with respect to commodity rates from eastern defined territories to Pacific coast terminals and intermediate points, shows that there are now six such through steamship lines, operating 49 vessels.

It is possible, for the reasons we have already indicated, that, where time was not a material element, shipments of freight might pass from San Francisco to Honolulu and thence via steamers to New York, and vice versa. Quite as roundabout routing of freight by water could be cited. We do not, however, upon the present record, give any consideration to this route.

Upon the record, we find that the Pacific Mail Steamship Company may compete for interstate coastwise traffic with the Southern Pacific Company within the meaning of the act.

TRAFFIC BETWEEN SAN FRANCISCO AND PORTS ON THE COAST OF MEXICO.

Section 1 of the act includes transportation of property "to an adjacent foreign country." It is conceded, by the partial omission of Mazatlan from the proposed traffic plan, that there is competition between the steamship company and the petitioner for traffic between San Francisco and Mazatlan, Mexico. If, however, Mazatlan is continued as a port of call, what we have already said about the inability of a common carrier to refuse freight between ports at which it stops applies with equal force to the traffic between San Francisco and Mazatlan.

The Mexican rail line of the petitioner connects directly with other ports on the Mexican coast at which the steamship company's boats call. It is admitted that there is direct rail connection with Manzanillo and Salina Cruz. The record and the maps and tables presented lead to the conviction that as to a considerable portion of territory along the southwestern coast of Mexico the steamship company and the railroad may compete for traffic to and from San Francisco, although the rail distance is much greater than that by water and the rail rates much higher than the water rates. It is admitted that there is potential competition as to passenger traffic. The total movement of freight by rail between points in California and Mexican points, Culiacan, 220 miles north of Mazatlan, to and including Tepic, the southern terminus of the railroad, was less than 5 per cent of the movement by water from San Francisco to

Mazatlan, in 1911 and 1912. The fact that freight traffic by rail has been small in the past is far from decisive that it will not be greater in the future. That there will be some competition is beyond controversy. The extent of it is wholly problematical.

Upon the record, we find that the Pacific Mail Steamship Company and the Southern Pacific Company may compete for traffic between San Francisco and the Mexican ports described.

EUROPEAN AND OTHER FOREIGN TRAFFIC.

Section 1 of the act includes shipments to and from a foreign country.

"It would be difficult to use language more unmistakably significant that Congress had in view the whole field of commerce (except commerce wholly within a state) as well as that between the states and territories as that going to or from foreign countries. *T. & P. Ry. v. I. C. C.*, 162 U. S., 198, 212; *Butterfield v. Trenahan*, 192 U. S., 470, 493."

It appears that the petitioner and the steamship company have been carrying freight to and from San Francisco for European and other ports, and that the steamship line receives at San Francisco freight from interior points. That there is, or may be, competition for this traffic is conceded, in that it is proposed to eliminate from the traffic of the steamship company all "freight at Colon or at Balboa in connection with European steamers." As we have said, the steamship company, as a common carrier, may not be able to refuse such traffic if it is offered to it. Emphasis, however, seems to be laid upon the fact that the traffic is now carried "in connection with European steamers." The character of foreign traffic is not determined by the billing but by the fact that at the point of origin it is destined for a foreign port and is taken up by intervening common carriers.

Shipments on local bills of lading destined from the beginning for export are foreign commerce. *Coe v. Errol*, 116 U. S., 517; *S. P. Terminal v. I. C. C.*, 219 U. S., 498, 527; *T. & N. O. R. R. Co. v. Sabine Tram Co.*, 227 U. S., 111. This common arrangement does not depend upon the establishment of a through route or the issue and recognition of a through bill of lading, but may be otherwise manifested. *C., N. O. & T. P. Ry. Co. v. I. C. C.*, 162 U. S., 184, 191; *Baer Bros. v. D. & R. G. R. R. Co.*, 233 U. S., 479, 491; *Railroad Commission of Louisiana v. T. & P. Ry. Co.*, 229 U. S., 336, 341. The fact that there is an arrangement by which

it is to be carried as foreign freight is evidenced by the conduct of each of the carriers. The fact that foreign freight originating at places in the United States is sent to San Francisco, taken by the steamship line and carried to Balboa or Colon, where it is unloaded for transshipment and is taken up by the foreign ship and carried to its destination, constitutes it foreign commerce. And the agents that carry it are agents of foreign commerce to the extent of the services they render. The real question here is whether as to any traffic there is a possibility of competition between the steamship line and the petitioner. The traffic which the steamship company proposes to carry under the resolution adopted by its stockholders is foreign freight; it is for transshipment to points "other than Europe." It is not local business that leads the steamship company to send its boats to Balboa and Colon. It is the foreign traffic. It is clear, therefore, that if petitioner had no interest in the steamship company, the latter would seek for and carry traffic destined to and coming from European ports and would thereby compete with petitioner for the foreign traffic which it carries to the seaboard.

Upon the record, we find that the Pacific Mail Steamship Company and the Southern Pacific Company may compete for traffic moving between San Francisco and vicinity and European ports.

IS THE PROPOSED SERVICE BY WATER A SERVICE THROUGH THE
PANAMA CANAL?

The amendment proposed by counsel for the petitioner, as well as the testimony of the vice president of the steamship company, is to the effect that the present southerly terminus of the steamship company's route is to be extended to Colon. This of necessity carries it through the Panama Canal. If any vessels of this line are not to go through the canal, that fact should be made clear by amendment to the petition with reference to such vessels by name and stating that their final destination southbound will be Balboa. Upon the record as it now stands we find that ships of the steamship company are intended to be "operated through the Panama Canal."

MAY THE PROPOSED SERVICE OF THE PACIFIC MAIL STEAMSHIP
COMPANY BE LAWFULLY OPERATED?

This question assumes a continuance of ownership or interest in the steamship company by the petitioner. This Commission is

merely an administrative agency to execute the act passed in pursuance to a public policy established by Congress.

This policy, as indicated in the act, includes bringing about a discontinuance of railroad ownership and control of water lines, except when, after investigation —

“the Commission is of the opinion that such existing specified service by water, other than through the Panama Canal, is being operated in the interests of the public, and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration.”

If, therefore, it be found that the service here considered, other than that through the Panama Canal, is operated in the interests of the public and is of advantage to the convenience of the people, and that its continuance will neither exclude, prevent, nor reduce competition on the route by water, the act contemplates authorizing a continuance of the service, even though there is, or may be, some measure of competition between petitioner and the steamship line.

The proposition on the record is to operate the boats through the Panama Canal, but it is also proposed to carry freight that will not pass through the canal or be competitive. The question arises therefore, whether this language is to be construed as applying to the vessels or to each particular shipment carried by the vessels. The language upon this point is, “such existing specified service.” The petitioner would have us construe this language as applying to each shipment carried. But reference to other portions of the section lead to a different conclusion. The language employed is, “such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation.” Here the words “existing service” clearly refer to any vessel or vessels. When we consider the probable difficulties to be met by the common carrier in excluding particular shipments and the easy way in which the terms of the statute could be evaded under such a construction, we are led to hold that the words “specified service” refer to the vessel or vessels operated. Under the proposed amendment of the application and the testimony of the vice president of the steamship company, we are confronted with the fact that these vessels are proposed to be operated through the canal to Colon. In view of these conditions and of the policy and requirements of the act, we are of opinion

that as to vessels of the steamship company which pass through the Panama Canal the Commission has no power to extend the time within which they may continue to be operated. If it is made to appear clearly that there are vessels which will go no farther than Balboa, and not through the canal, we could as to such vessels extend the time. The record discloses that there are several boat lines of American and foreign ownership plying between San Francisco and these Mexican and Central American ports and Balboa in direct competition with the Pacific Mail Steamship Company. The uncontradicted testimony of witnesses for petitioner and of shippers is that the service of the Pacific Mail is the most dependable, and that it is operated in the interests of the public and is of advantage to the convenience and commerce of the people. From the record it appears that the service proposed, other than through the Panama Canal, would be in the interests of the public and of advantage to the convenience and commerce of the people, and that its continuance would neither exclude, prevent, nor reduce competition on the route by water under consideration.

IF THE SERVICE BY WATER BE CONTINUED, MUST THE STEAMSHIP COMPANY FILE SCHEDULES OF ITS RATES AND PRACTICES?

The act provides that in every case in which the Commission grants extension of time during which the service by water may continue to be operated beyond July 1, 1914, "the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation." This language is definite and unqualified. It applies to every case in which such extension is granted, and it follows that if, under an amendment to the petition or upon further hearing, extension of time be granted as to any of the boats of the steamship company, the rates, schedules, and practices governing traffic subject to the act, moved by such boats, must be filed with the Commission and be subject to all of the provisions of the act in the same manner and to the same extent as those of petitioner.

Unless amendment to the petition is filed within 60 days from the service hereof, an order will be entered denying the petition.

IN THE MATTER OF THE SEPARATION OF OPERATING
EXPENSES.

30 I. C. C. 676 (1914).

W. J. Meyers and *Max O. Lorenz* for Interstate Commerce Commission.

W. D. Beymer for Central of Georgia Railway Company.

W. A. Colston, *G. W. Lamb*, and *A. J. Pharr* for Louisville & Nashville Railroad Company.

J. W. Coze for Norfolk & Western Railway Company.

A. D. McDonald and *Fred H. Wood* for Southern Pacific Company.

H. T. Newcomb for Delaware & Hudson Company.

A. H. Plant for Association of American Railway Accounting Officers.

H. C. Prince for Atlantic Coast Line Railroad Company.

E. J. Rich for Boston & Maine Railroad.

L. A. Robinson and *C. C. Wright* for Chicago & North Western Railway Company.

C. I. Sturgis for Chicago, Burlington & Quincy Railroad Company.

J. A. Taylor for Central Railroad Company of New Jersey.

R. A. White for New York Central lines.

L. D. Brandeis and *J. P. Muller*.

REPORT OF THE COMMISSION.

BY THE COMMISSION:

Statistical circular No. 3, issued by the Commission through the division of statistics, contained a proposed order requiring railway companies having annual operating revenues of \$100,000 and over, covering roads of classes I and II, to report to the Commission separately the greater portion of their freight and passenger expenses, certain common expenses being left unapportioned. A copy of this circular was sent to all railroad companies of these classes under date of March 19, 1914. In order that the subject might be thoroughly discussed a public hearing was held before the Commission in Washington on May 2, 1914. Briefs were filed both before and after the hearing.

The question before us is not new. Prior to 1894 a separation of freight and passenger expenses was made in the reports of the carriers. From 1888 to 1893, inclusive, the results of this separation were published by the Commission in its annual statistical report. The rule which was followed in the separation as made at that time is quoted below:

"All expenses which are naturally chargeable to either freight or passenger traffic should be entered in their respective columns; expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division between freight and passenger traffic in the proportion which the freight and passenger train mileage bears to the total mileage of trains earning revenue."

Soon after this separation of expenses was inaugurated railroad accountants began to suggest that it be discontinued. As early as 1890 a committee was appointed by the National Association of Railroad Commissioners to report upon the question. At the fourth annual convention of this association in 1892 the subject was actively discussed. It was not until 1893, however, that it was finally disposed of by the adoption of the report of the committee that the practice be discontinued. Under date of February 12, 1894, the statistician of the Commission advised the carriers that thereafter a separation of operating expenses between freight and passenger service need not be made.

From an examination of the early reports of the carriers, it is clear that the belief of those making the returns was that only a very few expenses were "naturally chargeable" to one service or the other. An arbitrary division of all, or nearly all, expenses on a train-mileage basis is useless, and the discontinuance of the separation at that time was undoubtedly justified. During the last 20 years, however, railway accounting and accounting generally have greatly developed, and for this reason a reconsideration of the matter at the present time seems warranted.

The arguments advanced in support of a separation of the expenses at the present time were that it would be a material aid in the determination of the cost of railway services, not only as between the two services — freight and passenger — as a whole, but also in determining the cost of particular classes of traffic, for the reason that the separation of freight and passenger expenses is fundamental in all cost of service inquiries. That an authoritative formula would simplify their work to a certain extent in rate cases is the argument urged by some of the carriers for a

general separation between freight and passenger services of all operating expenses, leaving none unapportioned. It was also claimed that the proposed reports would be of assistance in the study of comparative costs among railways.

The argument was advanced by one carrier that it is desirable to compare only total expenses with total revenues. The proper revenue of a carrier having then been determined, rates should be made in the various branches of the traffic solely on the basis of public utility. We do not believe, however, that sufficient reason has been given for abandoning the policy consistently pursued by the Commission of giving consideration to cost in establishing rates. What weight to give to the cost factor depends upon the particular case. The question now before us is the practicability of providing for the ascertainment of cost figures in the general manner indicated in circular No. 3.

In the case of manufacturing concerns it has been shown to be practicable to make some estimate regarding the cost of the individual articles manufactured. This is done not only as a basis for comparison of the efficiency of various departments, but also as a basis for ascertaining at what price the manufactured product should be sold. This naturally suggests the question whether it is not possible to pursue the same or similar methods in the accounting of railway companies. There is probably a difference in the extent to which the ascertained cost could be utilized as between manufacturing and railway companies, for the reason that a manufacturer may discontinue to manufacture a product which he finds to be unprofitable, whereas a railway may be compelled to continue an unprofitable service.

The actual practice of railway companies is helpful in the consideration of the question now before the Commission. For approximately one-half the mileage of the large carriers in the United States, operating expenses are now being divided between freight and passenger service. Among the railroads which make this separation are the Pennsylvania lines east and west of Pittsburgh, the Erie, the Baltimore & Ohio, the Louisville & Nashville, the Chicago, Burlington & Quincy, the Great Northern, and Northern Pacific. On the other hand, the New Haven, the Boston & Maine, the New York Central lines, the Southern, the Union Pacific, and Southern Pacific systems do not make a complete separation of all of their operating expenses between passenger and freight, although some of the important transportation accounts may be kept separately for the two services.

The officials of the road which make this voluntary separation state that it is done in order to secure efficiency and not for rate-making purposes. If the comparison is made on the same basis year after year, these officials state that it is not important whether the arbitraries which are used are exactly correct or not. To their minds what is exact enough for efficiency purposes could not be considered sufficient as a basis for rate making. It was also argued that the method of keeping these statistics is different when made for efficiency comparisons from what it would be when made suitable for cost of service accounting. Nevertheless the impression seemed to prevail that circular No. 3, as submitted to the carriers, does not conflict with efficiency accounting.

It is erroneous to suppose that the Commission is interested in statistics of this character merely for the purposes of rate making. The statistics would be valuable in making comparisons from year to year for the same railroad and for different roads in the same year. It is the duty of the Commission to keep itself informed regarding the manner in which the railway business is conducted, and a knowledge of the variations in unit costs is valuable to us even if no rates are based thereon.

The assumption that railway cost accounting can not be made sufficiently accurate for useful consideration in dealing with rates does not seem warranted. Although not possible 20 years ago, it would appear that at the present time approximately two-thirds of the operating expenses of a railroad can be separated in a reasonably satisfactory manner. The separation of the remaining one-third is useful if a basis is selected which equitably measures the use which either service makes of common facilities. This indicates the extent to which freight expenses can be subdivided among the various branches of freight traffic. Just as fuel, wages, and other direct expenses can be ascertained as between freight and passenger trains, so can they be distinguished as between individual freight trains.

It was urged that should the Commission really need information concerning costs, a special study could be undertaken at any time and be pursued until the requirements of the individual case had been met. Special studies will always be necessary, but they can not take the place of general statistics systematically compiled year after year. The latter, so far as they are applicable, are looked upon as more reliable than those which are collected for any particular case. Whether rightly or wrongly, "special purpose" statistics rarely command that confidence

which inheres in figures that are kept continuously on accepted bases without reference to a particular controversy.

It was suggested at the hearing that the Commission should wait until the courts had rendered decisions in certain pending rate cases before making a requirement of this character. What the courts have said must carefully be considered and conformed to. As to the cases before the courts at the present time, we believe that the courts have a right to look to this Commission and to the various state commissions for a careful study of railway statistics and accounts. What the Supreme Court said in the *Minnesota Rate case*, *Simpson v. Shephard*, 230 U. S., 352, in regard to the distribution of capital charges is an incentive to proceed with the work. The court said in that case that after distributing to each class of traffic the property exclusively used by it, comparable use units might be found for distributing the property used in common.

The possible misuse of information collected was also urged as a reason for not developing the subject of railway cost accounting. It was urged that to give cost accounting information to the public would be the same as giving dangerous instruments to children. The systematic development of this subject and its free discussion in the light of all information available is the best safeguard against the misuse of cost figures. There is reason to believe that the failure of carriers to develop cost figures along permanent lines has been responsible for some of the events regarding which many of them have complained in the present hearing. The action of certain state legislatures and commissions was alleged to have been unjust and unreasonable. Commissions and legislatures are not intentionally unfair, and if any of them have enforced unjust rates would not the kind of statistics here contemplated have convinced them that some other schedule would have been fairer? Would not this class of statistics command confidence which specially prepared figures can not always do? Comparisons of expense and performance have long been made by carriers in contested cases before the Commission. These have nearly always rested upon transient data. Those of the future should be based upon permanent analyses and compilations.

The fact that circular No. 3 provides for a separation for only a part of the accounts was referred to. A distinction is to be noted between those expenses which can be distributed between freight and passenger service only from an analysis of pay roll and vouchers, and those which must be distributed on various statistical

bases. For the greater part circular No. 3 deals with the former class of expenses. If these expenses were analyzed, it would be possible to complete the distribution for other accounts with the statistical bases which are in our possession. However, the information which is called for by circular No. 3 would be useful in ascertaining particular cost units among railways for different years and for the same railway from year to year. Nevertheless we believe that we should proceed to work out a complete formula for all expenses and require a separation of all expenses on prescribed bases.

The expense of making cost analyses was one of the chief arguments against the adoption of such a requirement. If followed out continuously in the closest detail, it may be that the expense would be prohibitive. That is not suggested here, and a division between freight and passenger service alone will not involve additional expense which can not be justified. The carriers were asked to submit estimates as to the expense of complying with circular No. 3. A request was made for a second estimate, based upon a modification of the circular along the lines suggested by the carriers. Copies of these replies were sent to the chairman of the Association of Railway Accounting Officers. In his opinion, compliance with the circular would mean an expense of \$8.78 per mile of road, or a total of \$2,057,478 for carriers having operating revenues in excess of \$100,000 per annum. This estimate is probably substantially correct if it is intended, as it appears to be, to cover a literal compliance with the circular as interpreted by him; but that is not what is here proposed.

The wide variation in the estimates is noteworthy. No satisfactory explanation has been advanced as to why it should cost the Lackawanna \$78.29 per mile, the Lehigh Valley \$18, the Southern \$14.25, and the Southern Pacific only \$3.17. If expense alone were to be the determining factor it would be necessary to have a new estimate after circular No. 3 has been revised in the light of the suggestions received.

Another argument in opposition was that after a simple and relatively inexpensive division between freight and passenger service had been instituted, more comprehensive and expensive requirements would be made in the future. Future requirements must rest upon their own merits and the future alone can decide whether additional requirements will justify the added expense. The carriers also contend that a division would have to be made between state and interstate traffic, because the Commission has

no jurisdiction over intrastate traffic. This argument overlooks the fact that it is not claimed that circular No. 3 would be sufficient in all cases. If it should become necessary for the Commission or a court to know the total expenses for interstate passenger traffic the work involved would be simplified very much if the division between freight and passenger service as a whole could be accepted at the start. Moreover, the Commission has considered cost in many freight cases and has never found it necessary to separate the state from the interstate cost. Cost does not change because a state line is crossed. The length of the haul and the volume of the traffic are among the determining factors in arriving at cost.

In our opinion ample reason exists for requiring railway companies to extend their analysis of operating expenses with respect to freight and passenger traffic beyond that which has hitherto been required in the annual reports. Circular No. 3 will be revised in the light of suggestions received, and a workable plan developed which will not be unduly burdensome to the carriers and which will yield statistical results of a fundamental character of value alike to carriers and the Commission. Additional conferences will be held with the view of eliminating and minimizing as far as possible all objectionable features. It does not seem practicable to do this, effective July 1, 1914. If sufficient progress can be made in the perfection of the circular, carriers will be asked to file a special report for the year ending June 30, 1915, showing the separation between freight and passenger expenses. As early as practicable all carriers in class I will be required to separate operating expenses for each account as follows:

1. Expenses directly assigned to freight service.
2. Expenses directly assigned to passenger, and allied, services.
3. Expenses apportioned to freight service on prescribed bases.
4. Expenses apportioned to passenger and allied services on prescribed bases.

No operating expenses are to be left unapportioned.

HARRIMAN *v.* INTERSTATE COMMERCE COMMISSION.

KAHN *v.* INTERSTATE COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION *v.* HARRIMAN.

211 U. S. 407 (1908).

The facts are stated in the opinion.

Mr. John C. Spooner and *Mr. John G. Milburn*, with whom *Mr. Robert S. Lovett* was on the brief, for Edward H. Harriman.

Mr. Walker D. Hines, with whom *Mr. Paul D. Cravath* was on the brief, for appellant, Kahn.

Mr. Frank B. Kellogg and *Mr. Cordenio A. Severance*, with whom *Mr. Henry L. Stimson* was on the brief, for Interstate Commerce Commission.

MR. JUSTICE HOLMES delivered the opinion of the court.

These are appeals; on the one side, from an order of the Circuit Court directing the appellants, Harriman and Kahn, to answer certain questions put during an investigation by the Interstate Commerce Commission, and, on the other, from a denial of a like order as to two other questions, answers to which the commission had required.

In November, 1906, the Interstate Commerce Commission, of its own motion, and not upon complaint, made an order reciting the authority and requirements of the act to regulate commerce (Feb. 4, 1887, c. 104, 24 Stat. 379), and proceeding as follows: "And whereas it appears to the Commission that consolidations and combinations of carriers subject to the act, and the relations now and heretofore existing between such carriers, including community of interests therein, and the practises and methods of such carriers affecting the movement of interstate commerce, the rates received and facilities furnished therefor should be made the subject of investigation by the Commission to the end that it may be fully informed in respect thereof, and to the further end that it may be ascertained whether such consolidations, combinations, relations, community of interests, practises, or methods result in violations of said act or tend to defeat its purposes; It is ordered that a proceeding of investigation and inquiry into and concerning the matters above stated be, and the same is hereby instituted."

A time and place was set for the first hearing, and the inquiry thus begun was continued for about two months, resulting in the report of July, 1907, entitled "Consolidations and Combinations of Carriers," etc. 12 I. C. C. R. 277.

In the course of the inquiry the appellant Harriman was called by the commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the Executive Committee of the Union Pacific Railroad Company. The relations between the Union Pacific and other connecting roads, parallel or not, were under investigation and are set forth in the commission's report. It is enough to say that the Union Pacific Railroad Company is incorporated under the laws of Utah, and, as has been asserted and assumed, has power under the state laws to purchase the stock of other railroads, a power that it has exercised on a large scale. Among other things, it bought 103,401 shares of the preferred stock of the Chicago and Alton Railway Company. These shares had been deposited with bankers, Kuhn, Loeb & Company, by their owners, under an agreement authorizing the bankers to sell them to any purchaser at such price and upon such terms as should be approved by Messrs. Stewart, Mitchell and the witness, Harriman. He was asked whether he owned any of the stock so deposited, and how much, if any. These questions, under the advice of counsel, he declined to answer.

Next he was asked with regard to stock of the Atchison, Topeka & Santa Fé Railroad Company, bought by the Oregon Short Line Railroad Company, another Utah corporation, the stock of which was owned by the Union Pacific, whether it was part of the stock that had been acquired previously by him and two others, and whether it or any part of it was owned by any of the three. After answering the first question, "I think not," he was stopped by his counsel and refused to answer further. Again, it appearing that the Union Pacific, in July, 1906, purchased 90,000 shares of Illinois Central Railroad stock from Messrs. Rogers, Stillman and the witness, he was asked whether that stock was acquired by a pool of the three, whether it was acquired with a view of selling it to the Union Pacific, and whether it or any part of it was bought at a much lower price than \$175 a share with the intent just mentioned. These questions the witness declined to answer. It appearing further that Kuhn, Loeb & Company, who were the fiscal agents of the Union Pacific, had sold to it 105,000 shares of the Illinois Central stock on the same date, he was asked if

he had any interest in these shares, and whether they were acquired by a pool for the purpose of selling them to the Union Pacific. These questions the witness declined to answer. Again, it appearing that the Union Pacific had purchased stock of the St. Joseph and Grand Island Railroad Company from the witness since the last-mentioned date, he was asked when he acquired the stock and what he paid for it, and again declined to answer. Finally, after it had been shown that since July, 1906, the Union Pacific had bought a large amount of New York Central Railroad stock, the witness was asked whether any of the directors of the Union Pacific were interested directly or indirectly in this stock at the time when it was sold. An answer to this question also was declined. All these refusals to answer were persisted in after a direction to answer from the commission. The Circuit Court ordered them to be answered and Harriman appealed.

The petition of the Interstate Commerce Commission set forth two other questions which the witness refused to answer, and on which it asked the order of the Circuit Court. One was a general one, whether he was interested in any stocks bought between the nineteenth of July and the seventeenth of August that appreciated, and another, more specific, was whether he or any director bought any Union and [or] Southern Pacific in anticipation of a certain dividend, the suggestion being that announcement of the dividend was delayed for the directors to profit by their secret knowledge and that they did so. With regard to these the petition was denied, and the Interstate Commerce Commission appealed.

The appellant Kahn was a member of the firm of Kuhn, Loeb & Company. He also was asked whether any of the directors of the Union Pacific were the real owners of any of the shares of the Chicago and Alton Railroad deposited, as has been stated, with Kuhn, Loeb & Company, and sold to the Union Pacific. He was asked further in various forms whether the before mentioned 105,000 shares of Illinois Central stock, or any part of them, really belonged to or were held for any of the directors of the Union Pacific. And again, whether at the same time that he bought these shares he bought for Messrs. Harriman, Rogers and Stillman the stocks they sold at the same time that he sold his. Finally he was asked whether the 105,000 shares, and the 90,000 shares turned in by Stillman, Rogers and Harriman, were all bought through his instrumentality for a pool of which they and he were members, that was operating in Illinois Central stocks for some months before July, 1906. All these questions he was

directed by the commission to answer, but refused. The Circuit Court ordered him to answer, and he appealed.

Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the commission, upon which its powers depend.

Before taking up the words of the statute the enormous scope of the power asserted for the commission should be emphasized and dwelt upon. The legislation that the commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, it if relates to commerce with foreign nations or among the several States. And the result of the arguments is that whatever might influence the mind of the commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only, legitimately influence the mind of the commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the commission has authority to require the attendance of witnesses "from any place in the United States, at any designated place of hearing." No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the un-

limited power claimed by the commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478, 479. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

Whatever may be the power of Congress, it did not attempt, in the act of February-4, 1887, c. 104, 24 Stat. 379, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions. Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the commission has "authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act." District attorneys to whom the commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and "for the purposes of this act the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpoena by an order of court and for taking depositions, which do not need statement.

The commission it will be seen is given power to require the testimony of witnesses "for the purposes of this Act." The argument for the commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it

gives the commission; that one of the purposes is that the commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require any one whom it may point out to attend and testify if he would avoid the penalties for contempt.

We are of opinion on the contrary that the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint. As we already have implied the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the commission was established, was to enforce the regulations enacted. These in our opinion are the purposes referred to; in other words the power to require testimony is limited, as it usually is in English-speaking countries at least, to the only cases where the sacrifice of privacy is necessary — those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the commission, "whenever an investigation shall be made," to make a report in writing, which was to "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and the findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the commission was directed to "investigate" by § 13, or in connection with an inquiry instituted by the commission, authorized by the same section, "in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang

together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers, subject to the provisions of the act, the commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary." Act of March 2, 1889, c. 382, § 8, 25 Stat. 855, 862.

It is true that in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, c. 3591, § 3, 34 Stat. 584, 589. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If by virtue of § 21 the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the *quasi*-judicial duties of the commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe on the strength of other than explicit and unmistakable words that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the commission is § 20, amended by act of June 29, 1906, c. 3591, § 7, 34 Stat. 584, 593. This authorizes the commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the commission may add in certain particulars, and further "to require

from such carriers specific answers to all questions upon which the Commission may need information." The commission may require certain other reports, and is to have access to all accounts, records and memoranda. The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power under the act to regulate commerce and its amendments to extort evidence from a witness by compulsion. What reports or investigations the commission may make without that aid but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906, 34 Stat. 823, directing the commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the commission the same power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, c. 3591, § 9, 34 Stat. 595, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this Act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templar & Indemnity Co. v. Jarman*, 187 U. S. 197, 205."¹

Order in 315 and 316 reversed.

Order in 317 affirmed.

Petition denied.

MR. JUSTICE MOODY, not having been present at the argument, took no part in the decision.²

¹ See *United States v. L. & N. R. R. Co.* U. S. S. C., decided February 23, 1915. — Ed.

² Dissenting opinion of MR. JUSTICE DAY, concurred in by MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, is omitted. — Ed.

KANSAS CITY SOUTHERN RAILWAY COMPANY *v.*
UNITED STATES OF AMERICA AND THE INTER-
STATE COMMERCE COMMISSION.231 U. S. 423 (1913).¹

This is an appeal from a decree of the Commerce Court dismissing appellant's petition in an action brought to have certain regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of carriers declared invalid and to enjoin the enforcement thereof. 204 Fed. Rep. 641. The regulations are contained in the "Classification of Expenditures for Additions and Betterments of Steam Roads," effective July 1st, 1909, and the First Revised Issue thereof, effective July 1, 1910.

To meet changed traffic conditions the appellant abandoned the old tracks duly constructed and laid new tracks. The appellant claimed the right to charge the full cost of these improvements to capital account, while according to the bookkeeping regulations of the Interstate Commerce Commission, it was required first to deduct from the cost thereof the estimated replacement cost of the portions of track no longer used, the difference only being carried into the property accounts, and a sum equal to the estimated cost of replacing the old sections of track being charged to the operating expenses of that year. To restrain the enforcement of the regulations so far as they required appellant to charge against its earnings the estimated replacement value (less salvage) of the six parcels of railroad line that were abandoned as an incident to great reduction was the principal object of the suit.

As a part of its program of improvements, appellant is engaged in erecting a new and enlarged shop and terminal plant at Shreveport, upon a different location from that of the existing shop and terminal plant, which latter are incidentally to be abandoned. It is claimed that the present shop and equipment are not worn out or obsolete, but are in good condition, and capable, with ordinary running repairs, of performing for an indefinite time the functions for which they were originally constructed. Appellant desires to charge the estimated value of the abandoned shop and

¹ The facts have been briefly restated. — Ed.

terminal plant, amounting approximately to \$100,000, against its accumulated surplus as represented in its profit and loss account. The regulations of the Interstate Commerce Commission relative to accounting, however, prohibit this charge, and require that the estimated replacement cost (less salvage) of the existing shop and terminal plant shall be charged to the Operating Expense Account. An injunction against the enforcement of the regulations in this regard also was prayed.

Mr. Samuel Undermyer, with whom *Mr. Walter C. Noyes*, *Mr. Arthur M. Wickwire* and *Mr. Irwin Undermyer* were on the brief, for appellant.

Mr. Assistant Attorney General Denison, with whom *Mr. Thurlow M. Gordon*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

MR. JUSTICE PITNEY delivered the opinion of the court.

The contention of appellant in the Commerce Court and in this court is, that the regulations of the Interstate Commerce Commission relative to the method of keeping the accounts of common carriers, so far as they are here questioned, are unreasonable, beyond the power or authority of either Congress or the Commission, and violative of the Fifth Article of Amendments to the Constitution of the United States, as being a deprivation of property without due process of law. It is claimed that the effect of enforcing the regulations under the circumstances of the case is to reduce the amount of net earnings applicable to dividends, and thereby cause an irreparable loss to the preferred stockholders, whose dividends are non-cumulative and payable only out of the income of the current year; that the property accounts become inaccurate, because while appellant has actually expended something more than \$600,000 in the improvement of its property, and its bonded indebtedness has been in fact increased by the like amount, the accounts will declare that for this expenditure the company has obtained a net accretion to its property of only a little over \$200,000 (\$629,399.74 less \$386,484, or \$234,747.74); that the Operating Expense Accounts will be improperly swollen by the inclusion therein of the sum of \$386,484, to the deception of the stockholders and the investing public, and the impairment of the financial credit of the company; and that under the require-

ments of the Commission this sum of \$386,484 cannot be charged to and finally taken out of the proceeds of the bonds, but must be charged to operating expenses, and thus taken from operating revenue, because of which (as is claimed) this amount, which has already been paid out of the proceeds of bonds, must ultimately be restored in cash to the bond account, and returned to the trustee or otherwise accounted for to the bondholders. As to the Shreveport shop and terminal plant that are to be abandoned, it is contended that it is unreasonable to require the cost of abandonment to be charged to operating expenses, and that this is a proper charge against the accumulated surplus, as represented in the profit and loss account.

The authority of the Commission rests upon § 20 of the "Act to Regulate Commerce" (February 4, 1887, 24 Stat. 379, c. 104, as amended by the Hepburn Act of June 29, 1906, 34 Stat. 584, cc. 3591). The constitutional validity of this legislation was sustained in *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 211, 214.

The authority conferred by Congress upon the Commerce Court (act of June 18, 1910; 36 Stat. 539, c. 309; Judicial Code, § 207) with respect to enjoining or setting aside the orders of the Commission, like the authority previously exercised by the Federal Circuit Courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. *Interstate Com. v. Illinois Central R. Co.*, 215 U. S. 452, 470; *Interstate Com. v. Union Pacific R. Co.*, 222 U. S. 541, 547; *Procter & Gamble v. United States*, 225 U. S. 282, 297; *Interstate Com. v. Balt. & Ohio R. Co.*, 225 U. S. 326, 340.

As to the intent and meaning of § 20, it is first insisted that the power conferred upon the Commission to prescribe the forms of accounts, records, and memoranda to be kept by the carriers, recognizes a distinction between the form and the substance; and that while the Commission, in order to obtain full and accurate information concerning the affairs of each corporation, must have power to require any reports, schedules, and accounts necessary to show the true financial condition of each carrier; yet that the grant must by fair interpretation, and in order not to amount to an unconstitutional delegation of legislative power, stop short of the point where the regulation in its essence goes not to the form but to the substance and involves interference with the

internal affairs of the corporation. We do not, however, think that any such distinction between the form and the substance is admissible with respect to the declared object of standardizing railroad accounts and obtaining therefrom full and accurate information concerning the affairs of the respective corporations. The very object of a system of accounts is to display the pertinent financial operations of the company, and throw light upon its present condition. If they are to truly do this, the form must correspond with the substance. In order that accounts may be standardized, it is necessary that the accounts of the several carriers shall be arranged under like headings or titles; and it is obviously essential that charges and credits shall be allocated under their proper headings — the same with one carrier as with another. Unless "Additions and Betterments," on the one hand, and "Operating Expenses," on the other, are to indicate the same class of entries upon the books of one carrier that they indicate upon the books of other carriers, there is no possibility of standardization. So far as such uniformity requirements control or tend to control the conduct of the carrier in its capacity as a public servant engaged in interstate commerce, they are within the authority constitutionally conferred by Congress upon the Commission. There is no direct interference with the internal affairs of the corporation; and if any such interference indirectly results, it is only such as is incidental to the lawful control of the carrier by the Federal authority and to this the rights of stockholders and bondholders alike are necessarily subject.

It is said, however, that the meaning of the term "operating expenses" was well defined at the time of the passage of the act of 1887, and that during the period intervening between the beginning of the work of the Commission thereunder and the passage of the Hepburn Act in 1906, the term had never been construed to include any charge for property abandoned in the course of improvements; and that this settled construction, upon familiar principles, must be deemed to have entered into the purpose of Congress when it reenacted the language of § 20 in the latter year, and added to it authority to the Commission to prescribe in its discretion the forms of accounts and a prohibition against keeping any others than those prescribed or approved by the Commission. But it will be observed that § 20, as originally enacted, authorized the Commission "in its discretion for the purpose of enabling it the better to carry out the purposes of this act, [to] prescribe a period of time within which all common

carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept." Congress, when it enacted the Hepburn Act in 1906, must have known that the Commission had not as yet found occasion to enforce this provision; and at the same time may be deemed to have contemplated that the authority then for the first time conferred upon the Commission to determine and prescribe the maximum rates to be charged by the carriers for the services to be performed by them, furnished a new and more cogent reason for establishing a uniform system of accounts.

The contention that the term "operating expenses" had a well-understood and defined meaning either recognized at the time of the passage of the act of 1887 or established by the constant practice of the Commission from that time until the Hepburn Act, so that the use of the term in the latter act amounted to an express limitation upon the grant of power to prescribe the forms of the accounts, is not well founded. Congress, in authorizing the Commission to prescribe a uniform system of accounts, recognized that accounting systems were not then uniform; and in reiterating this authorization in 1906, and adding a prohibition against the keeping of other accounts than those prescribed, manifested a purpose to standardize and render uniform the accounts of the different carriers with respect to matters that entered into property and the improvements thereof, on the one hand, and the current operations of the company, on the other. By the very terms of § 20, Congress at least outlined the classification of the carriers' accounts, for it required the annual reports to show "the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same . . . the surplus fund, if any, . . . the funded and floating debts, . . . the cost and value of the carrier's property, franchises and equipments; . . . the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet." By the same section the Commission was authorized to require these annual reports from all carriers subject to the Act, and to prescribe the manner in which the reports should be made, and for this and other purposes to require carriers to have "as near as may be, a

uniform system of accounts, and [to prescribe] the manner in which such accounts shall be kept."

Plainly, the law-making body recognized the essential distinctions between property accounts and operating accounts, between capital and earnings; it recognized that the practice of different carriers varied in respect to these matters; and that no system of supervision and regulation would be complete without requiring the accounts of all the carriers to speak a common language.

There is here no unconstitutional delegation of legislative powers. The reasoning adopted in *Interstate Com. Com. v. Goodrich Transit Co.*, 224 U. S. 194, 210, etc., is controlling. And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.

It is contended that the regulations of the Commission, in respect to the matters now under consideration, are so unreasonable and arbitrary as to constitute an abuse rather than an exercise of the powers conferred by § 20, and consequently that they ought to be set aside by judicial action. This is not on the ground that the Commission did not proceed with due deliberation and after proper inquiry. Respecting this, the record abundantly shows that in the year 1906, and shortly after the passage of the Hepburn Act, the Commission undertook, and for nearly three years prosecuted a most thorough investigation into the current practice of the principal railroad lines, procuring reports and recommendations from experts, and submitting tentative plans for the classification of accounts to the executives of the railroad lines and to a committee of accountants created by the Association of American Railway Accounting Officers, which association was made up of members representing practically every important railroad in the country.

The present attack upon the classification as adopted is, and must be, rested at bottom upon the contention that the regulations embodied in it are so entirely at odds with fundamental principles of correct accounting as intrinsically to manifest an abuse of power.

There is evidence in the record that substantially the same method of distributing charges for so-called "Additions and Betterments" between the Property Accounts and the Operating Accounts is and has long been pursued by important railroad carriers, and has received the sanction of at least one recent text-book writer, — Whitten, *Valuations of Public Service Corporations*, §§ 450, 451, 458, etc. Nevertheless, it is insisted with emphasis that property abandoned as an incident to permanent improvements is not an operating expense, and, in effect, that no matter what practice may be pursued by railroad accounting officers, it cannot properly be treated as such.

We are thus brought back to the fundamental distinction between (a) the property or capital accounts, designed to represent the investment of the stockholders, and to show the cost of the property as originally acquired, with subsequent additions and improvements; these assets being balanced by the liabilities, including the amount of the capital stock and of bonded and other indebtedness, with net profits or surplus, whether carried under the head of "profit and loss" or otherwise; and (b) the operating accounts, designed to show, on the one side, gross receipts or gross earnings for the year, and on the other side, the expenditures involved in producing those gross earnings and in maintaining the property, the balance being the net earnings.

Since the regulation of the railroad carrier by the public authority, and especially the fixing of the rates to be charged, depend primarily upon two fundamental considerations, (a) the value of the property that is employed in the public service, and (b) the current cost of carrying on that service, it is clear that the maintenance of a proper line of distinction between property accounts and operating accounts is essential to the execution by the Interstate Commerce Commission of the supervisory and regulatory powers conferred upon it by Congress.

Appellant contends, *inter alia*, that since the original locations were necessary in the development of its railroad line, and were abandoned only as an incident to the improvement and development of the property, the cost thereof, being as it is termed a part of the "cost of progress," should remain in the property account as representing a part of the stockholders' present investment.

Support for this contention is sought in previous decisions of this court. In *Union Pacific R. Co. v. United States*, 99 U. S. 402, a decision that turned upon the meaning and effect of an act of July 1, 1862, for aiding the construction of the railroad (12

Stat. 489, c. 120), it was said, at p. 420: "As a general proposition, net earnings are the excess of the gross earnings over the expenditures defrayed in producing them, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. It may often be difficult to draw a precise line between expenditures for construction, and the ordinary expenses incident to operating and maintaining the road and works of a railroad company. Theoretically, the expenses chargeable to earnings include the general expenses of keeping up the organization of the company, and all expenses incurred in operating the works and keeping them in good condition and repair; whilst expenses chargeable to capital include those which are incurred in the original construction of the works, and in the subsequent enlargement and improvement thereof." In *Illinois Central R. R. v. Interstate Commerce Commission*, 206 U. S. 441, the Commission had held (206 U. S. 449; 10 I. C. C. 544) that while repairs were properly chargeable to current operating expenses, yet expenditures for improvements and equipment "should not be taxed as part of the current or operating expenses of a single year, but should be, so far as practicable, and so far as rates exacted from the public are concerned, projected proportionately over the future." And in this court it was said (p. 462): "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenues of a single year." And, after pointing out that the case of the Union Pacific Railway Company in 99 U. S. had to do not with rates of transportation or the like, but with the construction of the words "net earnings" in an act of Congress, the court, in pointing out the difference between the position of the Government in that case and the position of a shipper of commodities in the case *sub judice*, said, with respect to the latter (p. 463): "His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear, that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

The expressions quoted were properly employed with respect to the questions then presented for decision. As expressions of the general principle, we see no occasion now to qualify them. In both cases it was recognized that in so complicated a matter as the construction, maintenance, and operation of a railroad line, it is difficult to define and perhaps more difficult to consistently apply a precise distinction between capital and expense accounts; and while the propriety of distributing improvement costs over a series of years was recognized, the impossibility of scientific accuracy in that regard was acknowledged. The question now is, whether the regulations of the Commission under attack do violence to these general principles — rather, it is whether those regulations are so clearly contrary to these and other applicable principles that they should be set aside as being in excess of the powers conferred by Congress upon the Commission.

We are unable to see that there is substantial inconsistency with principle, much less gross violation thereof. The contention of the appellant that property, originally acquired because necessary in the construction of the road, and afterwards abandoned only because rendered unnecessary by the improvement and development of the property, should remain in the property account as a part of the stockholders' investment, will be found, upon analysis, to rest upon the unwarrantable assumption that all capital expenditures result in permanent accretions to the property of the company. This in effect ignores depreciation — an inevitable fact which no system of accounts can properly ignore. A more complete depreciation than that which is represented by a part of the original plant that through destruction or obsolescence has actually perished as useful property, it would be difficult to imagine. The fact that the original investment was necessary in order that the second investment might be made is not a conclusive test. Reference is made to the cost of the scaffolding used in the erection of a house, and discarded when the house is completed; and to the cost of the paper that goes to the waste-basket, rather than to the printer, in the preparation of a literary composition; but these are fanciful analogies, and do not assist us here, where the real question is not how shall original cost be ascertained, but, how shall subsequent depreciation in value be reckoned and accounted for?

In *Knoxville v. Water Co.*, 212 U. S. 1, this court had to do with a similar element of depreciation, and, after pointing out that

such a plant as was there in question begins to depreciate in value from the moment of its use, and that before coming to the question of profit at all, the company was entitled to earn a sufficient sum annually to provide not only for current repairs but for making good the depreciation and replacing the parts of the property when they should come to the end of their life, the court proceeded to say (p. 14): "If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon overissues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past."

And since one of the manifest objects of Congress in authorizing the supervision and standardization of carriers' accounts, as is done in § 20 of the Interstate Commerce Act, was to enable the Commissioners to intelligently perform their duties respecting the regulation of carriers' rates for the services performed, and since it is settled that the property investment which is to be taken into consideration as one of the elements in fixing such rates is the property then in use (*Smyth v. Ames*, 169 U. S. 466, 546; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 41; *Minnesota Rate Cases*, 230 U. S. 352, 434, 454, 458), it is obvious that so far as the regulations of the Commission now under consideration discard the "cost of progress" theory, they need no further vindication.

It is insisted that if the appellant, having expended in round figures \$600,000, secured by the sale of bonds for improvements, can be compelled to charge \$400,000 of that amount to the operating expense of one year or to distribute it among the operating expenses of a series of years, and if it be forbidden to keep any other record representing the transaction, it will have in its possession no kind of record from which it can report accurately either the cost of its property or the cost of improvements or its operating expenses. This, we think, is a misapprehension of the effect of the regulations. They do not require appellant to falsify its books or to change in any way the evidential character of the original entries. The source of the money, and the disposition

made of it as expended, may and should be correctly shown. The regulations do require that the contemporaneous abandonment of other property be likewise shown, and the replacement cost, less salvage, charged to the appropriate accounts under operating expenses. This, if observed, of course results in enforcing a prescribed distinction between capital expense and operating expense. It does not require that the record of the expenditure be obliterated; but it does of course affect the results as they work out upon the balance-sheet. If this be fairly done, there is no transmutation of new property into operating expenses, but only an insistence upon the requirement that new property added shall not alone be the measure of the accretion to the property account, and that the depletion attributable to contemporaneous abandonment of other property shall likewise be reflected upon the books.

Stress is laid upon the fact that if the grade reductions in question had been made upon the line of the original right of way, even though made at double the expense, the cost would have gone into "additions and betterments," and would have stood as a permanent increment of assets in the property account; while with respect to similar improvements made off the line of the original right of way, appellant is not permitted to carry into the property account the full cost of the improvement, but must first deduct therefrom the estimated replacement cost (less salvage) of the portions of track no longer used, charging this to the account of operating expenses.

So far as the comparative expense of the different modes of improvement is concerned, little need be said. The accounting regulations do not seek to control railroad companies in the exercise of their discretion respecting what shall be done and how it shall be done, but only to systematize their accounts with respect to whatever is done. It is to be presumed that boards of directors, will select that method of accomplishing a needed grade revision that shall be preferable from the engineering standpoint and suited to the financial condition and prospects of the company; not that they will adopt an inferior or more costly method of improvement because of the accounting requirements.

The distinction drawn between grade improvements "off the line" and those made "on the line" rests upon the view that the discarding of sections of the original line of road is a loss or depreciation that in correct accounting should be taken out of the property account. If this is to be done, its value must be charged, directly or indirectly, as an expense incident to the

operation of the road. Whether it should be charged against the accumulated profits of previous years, as reflected in the profit and loss account, or against the profits of present and future years, may depend upon circumstances. The theory upon which the Commission has acted in formulating its regulations is fairly stated in its brief herein as follows: The abandonment of property incident to grade revision is "depreciation," and such depreciation is of two kinds, — (1) that which is not replaced in kind, and (2) that which is replaced by improved materials, track, or equipment. If a trunk line of road has a branch extending into a territory not served by its main line, and, finding the branch unprofitable, abandons it, taking up the track, without constructing any substitute to serve the same territory, the abandoned branch ceases to be an earning instrumentality; the stockholders can thereafter derive no profit from it; it has served its purpose, and only past operations have benefited from it. So far as the profits of past operations have not been distributed to the stockholders, they are represented in the profit and loss account, and therefore such an abandonment or depreciation is properly chargeable to that account unless a special depreciation account has been established in anticipation of such abandonments; and for such an account, provision is made in the regulations. The other kind of depreciation is the result of changes attributable to the inadequacy of the existing property to meet the demands of the future. The road or the structures have to be replaced with stronger or more efficient instrumentalities. Abandonments occasioned by changes of this character are therefore chargeable to future earnings, for the reason that the improved condition of the road is not only designed to meet the demands of the future, but presumably will result in economies of operation, and so the resulting benefits will be reaped by those who hold the stock of the company in the present and in the future. The railroad company may, if it sees fit, anticipate general depreciations, and make provision for them by establishing a reserve for the purpose; but if no such provision has been made the abandonments should be taken care of by charging them to present or future operating expense. In case, however, the amount is so large that its inclusion in a carrier's operating expenses for a single year would unduly burden the operating expense account for that year, the carrier may, if so authorized by the Commission, distribute the cost throughout a series of years.

A statement of the theory is sufficient to show that the regulation is not arbitrary in the sense of being without reasonable basis. And there is evidence to show that the Commission was warranted in adopting it, as sustained by expert opinion and approved by experience.

One of the reasons for the distinction made in accounting between improvements made on, and those made off, the old right of way is that in the former case the improvements show themselves in the physical structures, and can be inventoried and appraised by witnesses; the deepening of cuts and increasing of fills, while involving some abandonments (and these under the regulations are to be taken out of the operating account), yet in the main are visible upon the ground, and capable of mensuration and appraisement. To the suggestion that cuts filled up and embankments reduced would not be thus manifest, it is sufficient to say that if such cases occur they must be most extraordinary. When a railroad is originally constructed, cuts and fills are made to overcome natural inequalities of surface; if any undue grades are permitted to remain, it is usually because for reasons of economy cuts have been made less deep and fills less high than otherwise they would have been made. Therefore grade revisions upon the line of the original right of way are normally required for the purpose of removing summits in cuts and raising sags in fills; not *vice versa*.

It is said that the effect of the regulations, if complied with, is to deprive the preferred stockholders of a considerable part of the non-cumulative dividends from the net earnings of the company, to which they would otherwise be entitled. The preferred stockholders, as such, are not before the court, and this is not a proper occasion for determining their rights. Supposing, however, that the enforcement of the accounting system does require them to forego their current dividends, we do not concede that this amounts to an unlawful taking of their property. Assuming (as of course we must) that the management of the company has acted prudently in making these extensive improvements within a short time, instead of distributing them throughout a series of years, and without providing in advance any fund applicable to them, still it must be presumed that the improvements are necessary to the general welfare of the company, and will result in its increased prosperity, and therefore make better the assurance of dividends for the preferred stockholders in the future.

But, aside from that, the Interstate Commerce Act deals with

the carrier in its capacity as a servant of the public, and as a distinct entity, amenable to the legitimate regulation of Congress and the Commission. If in this aspect the carrier is not unwarrantably injured or deprived of its property by the exercise of the regulatory powers, the operation of such regulations cannot be restrained on the ground of agreements made by the stockholders amongst themselves for apportioning profits to one or the other class of stockholders. To admit this might materially hamper the Federal control over interstate carriers, and evidently would tend to render impracticable the standardization of methods of accounting.

Much stress is laid upon the situation that results from the circumstance that (as is claimed) these regulations were promulgated after appellant had mortgaged its property and issued bonds for financing the improvements in question. It is not contended that the regulations impair the rights of either party under the mortgage. The contention is that the company had the right to finance the full cost of the improvements out of the proceeds of a bond issue, and that the regulations amount in effect to a veto upon the action of the directors in this respect. Supposing this to be true, we are unable to perceive that the appellant is thereby relieved from compliance with the regulations. Whatever was done about authorizing the improvements and financing the cost from the bond issue was done subject to being displaced by the exercise of the powers conferred upon the Interstate Commerce Commission by the act of 1906. The regulations do not affect the administration of the borrowed money. It was borrowed *inter alia* specifically for use in "reducing grades to one-half of one per cent. on three full operating divisions, aggregating 41 per cent. of the total length of the line." And by the mortgage appellant covenanted to use the bonds and the proceeds thereof in calling in and redeeming an outstanding loan, "and for the general improvement of its property." In short, so far as appears, there is nothing in the regulations to prevent the appellant from devoting the money strictly to the purposes for which it was borrowed, although they do prevent the keeping of the accounts in such manner as to make it appear that the book value of the company's assets is enhanced to the full extent of the moneys disbursed in the improvements.

When it is said that the amount of \$386,484, which under the requirements of the Commission must be charged to operating expenses, must for that reason be ultimately restored in cash to

the bond account and returned to the trustee or otherwise accounted for to the bondholders, this does not mean that any obligation of that kind is imposed upon appellant by the classification. We are not referred to anything in the classification, in the provisions of the mortgage, or in the law, that imposes any such duty. What is meant (as we presume), is that if the operating expenses are increased and the operating revenue decreased by the amount mentioned, in accordance with the regulations, and the payment of dividends should nevertheless continue, the books would make it appear that the dividends were paid not from earnings but from the proceeds of the bonds. In other words, the regulations of the Commission prevent the proceeds of the bond issue from being used, in whole or in part, to maintain dividend payments *without that fact appearing upon the accounts*; and since it is improbable that appellant would be willing to have the accounts bear such an interpretation, it is probable that the proceeds of the bonds will not be employed for dividend purposes, and unless required for further improvements, may as well be returned to the trustee for the bondholders. Since one of the very purposes of establishing the accounting system is to deter the payment of dividends out of capital, the criticism, upon analysis, bears its own refutation.

The same may be said of the argument that enforcement of the regulations will impair the credit of appellant by diminishing apparent earnings, preventing continuance of dividends upon preferred stock and keeping down the aggregate value of "assets" upon the property accounts. Presumably the regulations have a tendency to place the accounting system upon a sound basis in these respects; and to accomplish this was one of the legitimate objects at which Congress aimed in the enactment of § 20 of the Interstate Commerce Act.

It is further insisted that even the theory upon which the accounting regulations rest does not, when analyzed, justify a charge of abandoned property to operating expenses, but at most a charge to profit and loss. The suggestion apparently has force; but, upon consideration, we are unable to see that it furnishes ground for judicial interference with the course pursued by the Commission. Except for the contention (already disposed of) that the value of the abandoned parcels should be permanently carried in the property account as part of the cost of progress, it is and must be conceded that sooner or later it must be charged against the operating revenue, either past or future, if the integrity of

the property accounts is to be maintained; and it becomes a question of policy whether it should be charged *in solido* to profit and loss (an account presumptively representative of past accumulations) or to the operating accounts of the present and future. If abandoned property is not charged off in one way or the other it remains as a permanent inflation of the property accounts, and tends to produce, directly or indirectly, a declaration of dividends out of capital. If it be charged off to the surplus account, it tends to prevent the declaration of dividends based upon a supposed accumulation of past earnings. If charged to operating expenses of the current and future years, it has a tendency to prevent the declaration of dividends from current earnings until the amount of the depreciation shall have been made up out of the earnings.

But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to operating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review.

What has been said respecting the enforced disposition of the charges for property abandoned in grade revision, applies as well to the abandonment of the present shop and terminal plant at Shreveport.

Decree affirmed.

3. QUASI-JUDICIAL CAPACITY

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

227 U. S. 88 (1913).

The facts are stated in the opinion.

Mr. Assistant Attorney General Fowler and *Mr. P. J. Farrell*, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for appellants.

Mr. Helm Bruce, with whom *Mr. Henry L. Stone* and *Mr. Albert S. Brandeis* were on the brief, for appellee.

MR. JUSTICE LAMAR delivered the opinion of the court.

The New Orleans Board of Trade, in October and November, 1907, brought three separate proceedings against the Louisville & Nashville Railroad, asking the Commerce Commission to set aside as unfair, unreasonable and discriminatory certain class and commodity rates (local) from New Orleans to (1) Mobile, to (2) Pensacola, and (3) through rates, via those cities, to Montgomery, Selma, and Prattville. The Railroad answered. A hearing was had, the issue as to commodity rates was adjusted by agreement, and on December 31, 1909, the Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored and a corresponding reduction made in the through rates. The Railroad thereupon on January 26, 1910, filed a bill, in the United States Circuit Court for the Western District of Kentucky, praying that the Commission be enjoined from enforcing this order, which it alleged was arbitrary, oppressive and confiscatory, and deprived the company of its property and right to make rates, without due process of law.

After a hearing before three Circuit Court judges, the carrier's application for a temporary injunction was denied (184 Fed. Rep. 118). Testimony was then taken before an Examiner. Later the suit was transferred to the newly organized Commerce Court — the United States being made a party. There, in addition to the evidence in the Circuit Court, the Railroad exhibited all that had been introduced before the Commission, as a basis for the contention that this evidence utterly failed to show that the rates attacked were unreasonable. This view was sustained by the Commerce Court, which, in a lengthy opinion, held (one judge dissenting) that the order was void because there was no material evidence to support it.

On the appeal here, the Government insisted that while the act of 1887 to regulate commerce (24 Stat. 379, c. 104, §§ 14, 15, 16) made the orders of the Commission only *prima facie* correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. 584, c. 3591, § 15) that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive and (though *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence." *Tang Tun v. Edsell*, 223 U. S. 673, 681; *Chin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonaite v. Wolf*, 226 U. S. 272; or, if the facts found do not, as a matter of law, support the order made. *United States v. B. & O. S. W. R. R.*, 226 U. S. 14. Cf. *Atlantic C. L. v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247.

2. The Government's claim is not only opposed to the ruling in *I. C. C. v. Union Pacific*, 222 U. S. 541, 547, and the cases there cited, but is contrary to the terms of the Act to Regulate Commerce, which, in its present form, provides (25 Stat. 861, § 17) for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that "they may be suspended or set aside by a court of competent jurisdiction." 36 Stat. 539 (15). Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right; whether the hearing was adequate and fair, or whether, for any reason, the order is contrary to law — are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. *Int. Com. Comm. v. Northern Pacific Ry.*, 216 U. S. 538, 544. In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm. v. Delaware &c. Ry.*, 220 U. S. 235, 251), by passing upon the credibility of witnesses, or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of the statute, "be set aside by a court of competent jurisdiction." 36 Stat. 551.

4. The Government further insists that the Commerce Act (36 Stat. 743) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing — for manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Int. Com. Comm. v. Baird*, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or re-

buttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown but presumptively sufficient information to support the finding. *United States v. Baltimore & Ohio S. W. R. R.*, 226 U. S. 14. . . .

CHAPTER IV
FUNCTION OF COURTS IN THE ENFORCEMENT OF
THE ACT

1. PRIMARY JURISDICTION OF THE COMMISSION

TEXAS AND PACIFIC RAILWAY COMPANY *v.* ABILENE
COTTON OIL COMPANY.

204 U. S. 426 (1907)

THE facts are stated in the opinion.

Mr. David D. Duncan, with whom *Mr. John F. Dillon*, *Mr. Winslow S. Pierce* and *Mr. Thomas J. Freeman* were on the brief, for plaintiff in error.

Mr. Hannis Taylor for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The oil company, the defendant in error, sued to recover \$1,951.83. It was alleged that on shipments of carloads of cotton seed made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that State, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and even if such court had jurisdiction, it could not, without disregarding the act to regulate

commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. Those relating to the subject of the establishing, filing and publishing by the railway company of rate sheets containing the rate which was complained of were as follows:

"7th. That the Western Classification Committee, agent and representative of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as 'A'; that this was the joint act of a number of roads, and the defendant adopted said joint classification; that on May 30, 1901, the South-western Freight Committee, agent of a number of roads and agent of defendant, filed with the said commission a supplement for numerous roads in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in Texas from all points in Louisiana east of Alexandria and west of Alexandria.

"8th. That said classification and said rate schedule was adopted by defendant was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

"9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public, as admitted by plaintiff, which admission is found in the statement of facts.

"10th. That other than said schedule and classification nothing has been filed with the Interstate Commerce Commission by or in behalf of defendant in the way of classifications, schedules or rates on cotton seed from points on its road in Louisiana to points on its road in Texas."

From the facts found the court stated the following as its conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in carload lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was that established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

There was judgment for the railway company. When the controversy came to be disposed of by the Court of Civil Appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. In opening its opinion the court said (85 S. W. Rep. 1052):

"Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation, for the transportation of a number of carloads of cotton seed from the town of Cotton Port and other designated towns in the State of Louisiana to the city of Abilene in the State of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether in a state court a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the Interstate Commerce Act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the con-

clusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of \$1,951.83, excessive freights charged, with interest. . . ."

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without jurisdiction, because no Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below and is also essentially involved in the cause as it is before us. Second, it is urged that the effect of the act to regulate commerce upon the right of the oil company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all affected by the provisions of the act. We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result if the premise was well founded, because we think the premise is either shown by the findings to be unfounded or it is not open for contention on the record. The premise rests upon two propositions of fact: *a*. That the findings of the trial court show that the rate sheet filed was joint and therefore did not necessarily relate to a shipment entirely over the road of the railway company. This contention, we think, is shown by the findings to be without merit, since those findings clearly point out that the rate sheet was filed by an agent of the

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Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both hence mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machine, or device in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts and their methods of dealing generally to enforce the provisions of the act. To that end it made the duty of the District Attorneys of the United States under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any carrier or shipper or any person or thing in the act or in violation of the act should be found to be in violation of the act or should be found to be in violation of the act, such carrier or shipper or person or thing should be liable to the act and to the penalties thereof.

if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Comm., 599, and note *a*; 2 Smith Lead. Cas., pt. 1, 8th ed., Hare & Wallace notes, p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preëxisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

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liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ." Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, *prima facie* effect in such courts being given to the findings of fact made by the Commission. By the ninth section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any District or Circuit Court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. . . ."

And by section 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such a person or preference given by the carrier to another. *Parsons v. Chicago & Northwestern Ry.*, 167 U. S. 447, 455; *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263, 275. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479, 494. And it is apparent that

the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479.

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because unless the requirement of a uniform standard of rates be complied with it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by

the various courts called upon to consider the subject as an original question. Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to

those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts and in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In *Swift v. Philadelphia &c. Ry. Co.*, 64 Fed. Rep. 59, it was held that in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper, until regularly corrected in the mode provided by the statute. And in *Kinnavey v. Terminal R. R. Association*, 81 Fed. Rep. 802, in an able opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view

any case except the one now under consideration, holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect correcting established schedules.

2. The cases of *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184; *Louisville & Nashville R. R. Co. v. Behlmer*, 175 U. S. 648, and *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 190 U. S. 273, involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced, because of errors of law committed by that body, this court declined to consider the question of the reasonableness *per se* of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness *per se* of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to remand the case to the Commission to enable it to perform that duty, a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In *Gulf, Colorado & C. Ry. v. Hefley*, 158 U. S. 98, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender

of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing the carrier was proceeded against under a statute of the State of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the state court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102):

"The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us. If, in disregard of the joint tariff established by the defendant and the St. Louis and San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law, while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield."

In *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242, the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rates. And a recovery of the excess collected over the quoted rate was allowed by a court of the State of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be in effect enabling the shipper, whose duty it was to ascertain the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made if adopted would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement,

when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complaint alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provisions contained in section 22 of the act to regulate commerce, viz.: ". . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant

redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency and affords no justification for so interpreting the statute as to destroy it. Even, however, if in any case we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that by judicial exposition and in practical execution it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by section 1 of the act approved February 19, 1903, commonly known as the Elkins act, which, although enacted since the shipments in question, is yet illustrative, the willful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of section 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by section 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a Cir-

cuit Court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

BALTIMORE & OHIO RAILROAD COMPANY v. UNITED STATES *EX REL.* PITCAIRN COAL COMPANY.

215 U. S. 481 (1910)

The facts are stated in the opinion.

Mr. Hugh L. Bond, with whom *Mr. W. Ainsworth Parker* was on the brief, for Baltimore and Ohio Railroad Company, plaintiff in error.

Mr. Edgar H. Gans, with whom *Mr. Charles H. Markell* was on the brief for Fairmont Coal Company *et al.*, plaintiffs in error.

Mr. William A. Glasgow, Jr., with whom *Mr. Frederick Dallam* was on the brief, for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

To decide the merits of this cause will require us to determine the legality of the regulations of the Baltimore and Ohio Railroad Company, by which that company distributed cars to coal mines along the line of its road in case of car shortage. As an incident to this general question we would further be required to consider the relations, irrespective of its mere attributes and duties

as a common carrier; of the Baltimore and Ohio Railroad with various coal mines along the line of its road and the relation with or control over some, if not all, of these coal mines by other mines or mine operators, and in addition to consider the relation of the Baltimore and Ohio Railroad with the Cumberland and Pennsylvania Railroad. This road taps the main track of the Baltimore and Ohio railroad at Cumberland, Maryland, proceeds thence to the state line between Maryland and Pennsylvania, where it strikes the Pennsylvania Railroad, and passing thence through a country rich in bituminous coal deposits, and containing coal mines, it reaches Piedmont, West Virginia, where its tracks again connect with those of the Baltimore and Ohio Railroad. As an additional incident we might also be required to consider the relation or control, direct or indirect, if any, which the Baltimore and Ohio Railroad exerted over some, if not all, of the coal mines along the line of the Cumberland and Pennsylvania road. Some, therefore, of the underlying questions involved in the cause, if we may consider them, are similar to the issues which were passed upon by us in the case of the *Interstate Commerce Commission v. Illinois Central Railroad*, which we have just decided, *ante*, p. 452. While referring to the general situation as depicted in that case, we think, in addition, a mere outline sketch of the conditions existing prior to the commencement of this suit, as regards the matters with which it is concerned, will serve to render clear the reasons which control us in deciding it.

The Baltimore and Ohio Railroad Company, a corporation existing under the laws of Maryland, owned and operated a railroad or railroads in the States of Maryland, West Virginia, Virginia, Pennsylvania, Ohio and other States, and, as a common carrier, was engaged in interstate commerce between such States. The main line of said road west of Cumberland, Maryland, passes through a bituminous coal field, which is worked by many coal operators, the product of whose mines depend for their movement to market in interstate commerce on the facilities for such movement which the Baltimore and Ohio affords. For the purpose of this case, the coal mines referred to may be treated as situated in what is described as the Monongah District of the Baltimore and Ohio Railroad. Regulations of the Baltimore and Ohio Railroad, by which mines were rated in order to fix the basis for a *pro rata* distribution of coal cars in case of car shortage, had their peculiarities differing from other roads. They were based, first, upon the capacity of the mines; second, upon the previous shipments by

the mines for a period of two years, the capacity counting as one and the previous shipments as two. The capacity was ascertained by considering the number of working places, etc., modified by taking into account the facilities for moving the coal out of the mine, such as tracks, tipple, etc. The previous shipments were taken from the records of the company during periods when there was no car shortage. Upon the basis of the capacity thus ascertained the regulations of the company for giving each mine owner in the case of shortage its percentage of cars, stated in the most summary way, were briefly these: In the first place, there was assigned, out of the general mass of cars before the distribution was made, such cars as it was deemed the Cumberland and Pennsylvania Railroad was entitled to. This was done by no fixed rule, but, in the discretion of the traffic manager, generally upon the basis of the percentage of shipments of coal hauled in the two previous years by that road. The estimated mass remaining after the deliveries to the Cumberland and Pennsylvania Railroad were subjected to certain arbitrary assignments, and the remainder, after such assignments had been taken out, were equally distributed among the mine operators, according to their capacity rating. The arbitrary deductions which were made, as we have just stated, were these:

1. Baltimore and Ohio Railroad cars placed at mines for Baltimore and Ohio fuel coal.
2. New mines are allotted an arbitrary number of cars daily or weekly for development. In cases where the inspection shows a marked increase in the capacity of certain mines, and it is not practicable to change the percentage of the whole district, proper arbitraries are applied pending a general revision.
3. Cars of foreign railroads assigned by them to their own fuel trade.
4. Cars of individual companies placed at mines owned by such companies and cars owned by individual consumers placed at mines for their coal.

There are also certain exceptions of a local character, as follows:

1. Curtis Bay premium. Whenever a shipper on the Baltimore and Ohio Railroad handles cars at Curtis Bay promptly in any one month, he is allowed in the succeeding month a premium of fifty per cent of the number of cars so handled, in addition to his regular percentage. This in lieu of an assignment of cars to the Curtis Bay trade.

2. At certain points, noted on the percentage sheets, an arbitrary number of cars is assigned to mines on fire.

3. At certain mines in the immediate vicinity of industries, empty cars intended for loading at such industries are first sent into the mines for loading coal for such industries.

4. When annual contracts are placed for foreign railroad fuel coal with mines on the Baltimore and Ohio, arrangements are made that if the foreign railroads' cars are furnished for this fuel coal, the Baltimore and Ohio will allow the mines shipping the coal a number of Baltimore and Ohio cars equal to the foreign cars furnished.

5. When mines are connected with foreign railroads as well as with the Baltimore and Ohio, their rating is reduced fifty per cent. A similar reduction is made in cases where mines are located near rivers and are equipped for loading boats.

Where mines needed box and stock cars for the shipment of coal, as to which class of cars shortage rarely arose, there was a special rule which we need not notice.

With the system just referred to in force on the nineteenth of January, 1907, the Pitcairn Coal Company, a West Virginia corporation, owning a coal mine on the line of the Baltimore and Ohio Railroad in West Virginia, filed its petition in mandamus in the United States Circuit Court for the District of Maryland. The defendants were the Baltimore and Ohio Railroad Company, the Fairmont Coal Company, the Clarksburg Fuel Company, the Pittsburg and Fairmont Fuel Company and the Southern Coal and Transportation Company, these four coal companies operating coal mines located in West Virginia on the Monongah Division of the Baltimore and Ohio Railroad. Along with these there were also made defendants two other corporations, the Consolidation Coal Company, located on the Cumberland and Pennsylvania Railroad in Maryland, and the Somerset Coal Company, located on the Baltimore and Ohio Railroad in Pennsylvania. All of these coal companies were charged to be substantially one in interest and were generally described as the Fairmont Companies. In addition, thirty-one other coal companies, alleged to be independent companies, operating coal mines on the line of the Baltimore and Ohio Railroad, were also made defendants. Rearranging somewhat the order of the averments as contained in the bill, the prayer for relief was substantially based upon the following grounds: The Pitcairn Coal Company, it was averred, was entitled to an equal distribution of the coal cars of the Baltimore and

Ohio Railroad in times of shortage, in order to move its output of coal in interstate commerce, that the railroad company had refused, after demand, to give it the share of cars to which it was entitled, and that its not doing so had been seriously prejudicial to the business of the company, had curtailed its production and interfered with the moving of the coal produced in interstate commerce, and that the conduct of the railroad in the premises had amounted to the giving of an undue preference to the Fairmont Coal Company and its affiliated companies, to the prejudice of the Pitcairn Company and all other independent companies. The method pursued by the Baltimore and Ohio Railroad for rating mines, by the consideration of both capacity and previous shipments, was alleged, and it was charged that, on the basis of capacity of the mine as rated by that system, the Pitcairn Company was entitled to seven-tenths per cent of the cars for distribution in the Monongah Division. General averments were, however, made concerning the method of rating, which, in effect, charged that such method was discriminatory and preferential, and was put in force so as to operate in favor of the Fairmont Coal Company and the companies affiliated with it, to the prejudice of the Pitcairn Company and other independent coal operators, the Baltimore and Ohio Railroad being interested, it was charged, directly or indirectly, in the Fairmont and its affiliated companies. The method of deduction from the mass of cars for the benefit of the Cumberland and Pennsylvania Railroad was also charged to be discriminatory and preferential, and to have been devised for the purpose of favoring mines on the line of the Cumberland and Pennsylvania, which were affiliated with the Fairmont. The failure to charge against the mines which had received them, individual or private cars, foreign railroad cars and company fuel cars, as well as the other arbitrary allotments of cars provided for in the regulations to which we have referred, including the Curtis Bay regulation, were all assailed as preferential and discriminatory, it being alleged that in many instances the individual cars had been virtually paid for by the Baltimore and Ohio Railroad, and that the failure to charge them was in effect a mere means resorted to in order to give a preference contrary to the act to regulate commerce. The prayer was for an alternative writ of mandamus, commanding an equal distribution in accordance with the averments of the petition in effect for the undoing of the regulations referred to, and for the establishment of regulations conformable to the rights which the petition asserted.

As the scope of the prayer is important in the view we take of the case, it is excerpted in the margin.¹

It suffices for the present purposes to say that the answer of the Baltimore and Ohio Railroad traversed every averment as to preference and discrimination, asserted the validity of the method of rating and the rules of distribution to which we have referred. In great detail the origin and history of the operation of private or individual cars was set out, various contracts on that subject were annexed to the bill, and a decree rendered by the Circuit Court of the United States for the Northern District of West Virginia in favor of the Fairmont Coal Company, perpetually enjoining the Baltimore and Ohio Railroad Company to deliver certain private cars to the Fairmont Company, was referred to and made part of the bill. The Cumberland and Pennsylvania Railroad Company, the Fairmont Coal Company and the five coal companies alleged in the bill to be affiliated with the Fairmont Coal Company applied for leave to answer, on the ground that, although the alternative rule for mandamus had not been served

¹ First. That in the event of scarcity of cars to be furnished by defendant, Baltimore and Ohio Railroad Company, to shippers of coal on the Monongah Division of said road, that defendant, the Baltimore and Ohio Railroad Company, be required to furnish to relator one and seven-tenths (1.7) per cent until such percentage shall properly be increased, of the total number of cars in service, or supplied to all the shippers on the Monongah Division of said road, without deducting from said number of cars "Individual Cars," or any arbitrary allotment of cars to other shippers, and without deducting from the total number of cars on all the lines of the Baltimore and Ohio Railroad the "Individual Cars" claimed by the Somerset Coal Company, or the cars arbitrarily assigned to the Cumberland and Pennsylvania Railroad Company, or the Consolidation Coal Company, before making the percentage distribution to the Monongah Division.

Second. That writ of mandamus may be issued against the said Baltimore and Ohio Railroad Company, defendant, to command and require it to cease to make or give any undue or unreasonable preference or advantage to Fairmont Coal Company, Consolidation Coal Company, Cumberland and Pennsylvania Railroad Company, Somerset Coal Company, Southern Coal and Transportation Company, Clarksburg Fuel Company, or Pittsburg and Fairmont Fuel Company, or either of them, in the shipping and transportation of their coal, and to cease from subjecting the relator, Pitcairn Coal Company, or any other independent shipper of coal on the Monongah Division aforesaid, to any undue or unreasonable prejudice or disadvantage in the shipping and transportation of coal, or in any respect whatsoever and to move and transport the traffic of relator, Pitcairn Coal Company, and the other independent coal companies on the Monongah Division aforesaid, without discrimination or preference, and to furnish the said Pitcairn Coal Company, and the other independent shippers of coal on the Monongah Division, without preference or

upon them, and they had only been summoned to "do whatever they deemed proper to protect their interest in the premises," they desired to answer, because the questions involved "are extremely important and of unusual interest, not only to your petitioners and the railroad against whom the mandamus is asked, but to the whole body of transportation companies engaged in interstate commerce, and that the importance of the questions involved is so great that your petitioners feel that they are making but a reasonable request when they ask for a reasonable time to thoroughly present the facts which the court ought to be in possession of for a full and complete determination of the question." The right to answer having been given, and delay for that purpose having been accorded, these companies answered. Without at all going into detail, we think it suffices to say that the answer traversed all the averments as to preference and discrimination alleged in the bill. It specially asserted the legality of the operation on the Baltimore and Ohio Railroad of private or individual

discrimination, and upon conditions as favorable to it or them as is given by the said railroad company to the said Fairmont Coal Company, Consolidation Coal Company, Somerset Coal Company, Clarksburg Fuel Company, Southern Coal and Transportation Company, and Pittsburg and Fairmont Fuel Company, or for like traffic, under similar conditions, to any other shipper, its fair and reasonable percentage of all cars on the line of said railroad and to shippers of like traffic along its railroad line, based upon the system of distribution of cars in effect on said railroad as aforesaid, or upon any fair, reasonable and equitable basis, and to furnish to the said Pitcairn Coal Company, for the transportation of its coal, without discrimination, exception or limitation, and upon conditions as favorable as those given to other shippers, the percentage of the total car supply on said railroad at this time properly distributable by said railroad company to the said Monongah Division, and thereon distributed among the relator and the other shippers of coal thereon as aforesaid.

Third. That in ascertaining and fixing the number of cars to which relator, Pitcairn Coal Company, and the other coal companies on the Monongah Division aforesaid are entitled, the said Baltimore and Ohio Railroad Company shall take into consideration and include in the estimate or calculation of the number of cars, to be divided in the proportion to which the percentages of each mine entitles the owner thereof to cars, all cars, whether owned by individual operators, shippers, other railroad companies or by the Baltimore and Ohio Railroad Company, and which may be upon the road of said Baltimore and Ohio Railroad Company, and shall also take into consideration, and include in the estimate or calculation of the number of cars to be divided upon the percentages aforesaid, all cars, whether furnished or used by for fuel or supply coal for the Baltimore and Ohio Railroad Company, or for any other railroad company, and shall not deduct, before dividing the cars upon the percentages aforesaid, any cars for premiums at Curtis Bay, or other arbitrary allotments.

cars; made copious reference to the acts or contracts from which the right to operate said cars had arisen; charged that to take said cars from the service of the persons who owned them would be confiscatory, and in substance asserted the validity of the system of rating and of distribution enforced by the regulations of the company which we have previously referred to. Fourteen out of the thirty-one corporations referred to in the petition as independent companies briefly answered, adopting the averments of the petition, and praying for the awarding of the relief therein asked. Sixteen did not answer, and one of said companies substantially joined in the defenses of the railroad company, except as to the individual cars, concerning which it averred that it was the duty of the railroad to purchase said cars from the persons owning them and to operate them as part of the railroad equipment. By stipulation the cause was heard by the court without a jury.

There was voluminous testimony and a protracted trial, each side requesting findings and instructions embodying their respective contentions and excepting in so far as they were overruled. The court considered all the contentions raised by the pleadings except several which were not pressed at bar. It held that in view of the relations which the Cumberland and Pennsylvania Railroad had to the Baltimore and Ohio and the origin of those relations the method by which coal cars were turned over to the Cumberland road was not preferential or discriminatory. It decided that however amenable, abstractly considered, to criticism, if at all, might be the system of rating, and especially the inclusion therein of the amount of coal shipments, and the large influence attributed to that fact, yet, when the particular facts concerning the Monongah district and the relations of the Baltimore and Ohio to that district were given their proper weight, the system was a just one and ought not to be interfered with. The complaint as to the Curtis Bay premium was also decided to be without merit; and so also was the complaint as to consumer's cars, as to foreign railway fuel cars and company fuel cars. Considering the private cars belonging to mine operators, and, without at all going into the relation of the Baltimore and Ohio Railroad with the owners of such cars, it was decided that while there was a right on the part of the railroad to move the cars, and it would be confiscation to deprive the owners of the right to use them, yet the duty was on the railroad to take account of the cars in fixing the percentage in case of shortage. The court declined to

consider the decree which had been rendered in favor of the Fairmont Company against the Baltimore and Ohio in the previous case, which was pleaded, as well as that in another cause which was relied upon in argument to the same effect as controlling. The mandamus prayed therefore was refused as to every item embraced in the petition but that particular item, and, as to it, the writ was awarded. *United States v. Balt. & Ohio R. R.*, 154 Fed. Rep. 108.

The Baltimore and Ohio Railroad Company, the Fairmont Companies and the Pitcairn Coal Company prosecuted error. The Circuit Court of Appeals held as follows: *a*, that the system of rating, so far as taking into view the shipments and percentages based thereon was considered, was discriminatory and preferential; *b*, that while the right to allot cars to the Cumberland and Pennsylvania Railroad under the facts found below was lawful, the methods by which the allotment was made was also discriminatory and preferential; *c*, that the practice as to the Curtis Bay regulation was also amenable to the same criticism; *d*, that the duty existed to take into account the individual cars, the foreign railway fuel cars and the company fuel cars in making a *pro rata* division in case of car shortage, and that not to do so would give rise to undue preferences and unlawful discriminations forbidden by the act to regulate commerce. Concluding that the various subjects embraced in the complaint with which it thus dealt were all controlled by the act to regulate commerce, it was expressly decided that the right to rectify the wrongs by the issue of the writ of mandamus as prayed for was sanctioned by the twenty-third section of the act to regulate commerce, and the case was remanded to the court below, with directions to allow the writ of peremptory mandamus, in accordance with the opinion. *United States v. Balt. & Ohio R. Co.*, 165 Fed. Rep. 113. The case is here upon error prosecuted by the Baltimore and Ohio Railroad and the Fairmont Coal Companies.

One of the assignments of error assails the correctness of the conclusion of the court below to the effect that, compatibly with the act to regulate commerce, there was power under the circumstances disclosed by the record to consider the subject-matters which were complained of, and to award the relief concerning them which was prayed. Indeed, the nature of the controversy and the relief which it requires is such that, even without the assigned error, to which we have referred, the question at the very threshold necessarily arises and commands our attention as to

whether there was power in the courts, under the circumstances disclosed by the record, to grant the relief prayed consistently with the provisions of the act to regulate commerce, and to that subject we therefore at once come.

To a consideration of this question it is essential to at once summarily and accurately fix the subject-matter of the alleged grievances and the precise character of the relief required in order to remedy the evils complained of upon the assumption of their existence. As to the first, it is patent that the grievances involve acts of the Baltimore and Ohio Railroad, regulations adopted by that company and alleged dealings by the other corporations, all of which, it is asserted, concern interstate commerce, and all of which, it is alleged, are in direct violation of the duty imposed upon the railroad company by the provisions of the act to regulate commerce. As to the second, in view of the nature and character of the acts assailed, of the prayer for relief which we have previously excerpted and of the relief which the court below directed to be awarded, it is equally clear that a prohibition, by way of mandamus, against the act is sought and an order, by way of mandamus, was invoked, and was allowed which must operate, by judicial decree, upon all the numerous parties and various interests as a rule or regulation as to the matters complained of for the conduct of interstate commerce in the future. When the situation is thus defined we see no escape from the conclusion that the grievances complained of were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions.

The controversy is controlled by the considerations which governed the ruling made in *Texas & Pacific Ry. Company v. Abilene Cotton Oil Co.*, 204 U. S. 426. In that case suit was brought in a court of the State of Texas to recover, because of an exaction by a carrier, on an interstate shipment, of an alleged unreasonable rate, although the rate charged was that stated in the schedules duly filed and published in accordance with the act to regulate commerce. After great consideration, it was held that the relief prayed was inconsistent with the act to regulate commerce, since by that act the rates, as filed, were controlling until they had been declared to be unreasonable by the Interstate Commerce Commission on a complaint made to that body. It was pointed out

that any other view would give rise to inextricable confusion, would create unjust preferences and undue discriminations, would frustrate the purposes of the act, and, in effect, cause the act to destroy itself. The ruling there made dealt with the provisions of the act as they existed prior to the amendments adopted in 1906, and when those amendments are considered they render, if possible, more imperative the construction given to the act by that ruling, since, by § 15, as enacted by the amendment of June 29, 1906, the commission is empowered, indeed it is made its duty, in disposing of a complaint, not only to determine the legality of the practice alleged to give rise to an unjust preference or undue discrimination, and to forbid the same, but, moreover, to direct the practice to be followed as to such subject for a future period, not exceeding two years, with power in the commission, if it finds reason to do so, to suspend, modify, or set aside the same, the order, however, to become operative without judicial action. In considering § 15 in the case of *Interstate Commerce Commission v. Illinois Central Railroad Co.*, just decided, *ante*, p. 452, it was pointed out that the effect of the section was to cause it to come to pass that courts, in determining whether an order of the commission should be suspended or enjoined, were without power to invade the administrative functions vested in the commission, and therefore could not set aside an order duly made on a mere exercise of judgment as to its wisdom or expediency. Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the *Abilene* case, that the primary interference of the courts with the administrative functions of the commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interstate commerce is assailed in the courts as unjustly preferential and discriminatory. Upon the facts found the complaint is declared to be well founded. The administrative powers of the commission are invoked concerning a regulation of like character upon a similar complaint. The commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action

of the commission was to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record but by the record in the case of the *The Interstate Commerce Commission v. Illinois Central Railroad Company*, *ante*, p. 452. [215 U. S.]

We say this record, because, as has been pointed out, one of the questions which we would be called upon to decide if the merits were open is whether the court below was right in holding that if anything but the physical capacity of a mine was taken into consideration by a railroad company in rating the mine for car distribution in time of car shortage, the act to regulate commerce would be violated, and therefore the system adopted by the Baltimore and Ohio Railroad Company was repugnant to the act, because it made not alone the physical capacity but past shipments factors to be considered. But the reports of the Interstate Commerce Commission show that on a complaint made to that body on the subject of the system of mine rating of the Baltimore and Ohio Railroad Company, the commission, before the decision of the Circuit Court of Appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce. In that report, speaking of the Baltimore and Ohio system of mine rating, it was said (*Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep. 94):

"This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only."

And after elaborately weighing the matter, it was said (p. 95): "In combining the two systems the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared, on this record, to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only."

We say also the *Illinois Central case*, since it is shown in that case that when the railroad company changed its regulations,

presumably to have them conform to the administrative ruling made by the commission in the *Hocking Valley case*, such change was prevented from going into effect by an injunction issued by the Circuit Court of the United States for the Northern District of Illinois in the *Majestic Coal Company case*. And when the commission came to discharge its duty upon the complaint made to it in the *Illinois Central case* it was put to the alternative of either abdicating its administrative duties or making an order in violation of the injunction.

And the destructive effect upon the system of regulation devised by the act to regulate commerce, which these illustrations show must be the result of construing that act as giving authority to the courts, without the preliminary action of the commission, to consider and pass upon the administrative questions which the statute has primarily confided to that body, may be greatly multiplied. This is shown by the opinion of the commission in the *Baltimore and Ohio case*, to which we have already referred, where the decisions of other lower courts are referred to in conflict with the opinion of the court below in this case as to mine rating, and not in harmony with the views expressed by the commission in the *Baltimore and Ohio case*.

The court below deemed that it was its duty to award to the coal company the relief by mandamus which was prayed, upon the theory that § 23 of the act to regulate commerce rendered it imperative to do so, this conclusion being specially based upon the provision of that section authorizing the remedy of mandamus to compel carriers "to furnish cars or other facilities for transportation for the party applying for the writ."

The section in question is as follows (§ 10 of Act of March 2, 1889, c. 382, 25 Stat. 855, 862):

"SEC. 23. That the Circuit and Districts Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act of which this is a supplement and all acts amendatory thereof as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party apply-

ing for the writ; *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement."

That it is not necessary to point out that there is ample scope for giving effect to and applying the remedy embraced in § 23, if that section be construed in harmony with the act of which it forms a part, and not as destructive of one of the main purposes of the act, is, we think, obvious. It is to be observed that the section, besides empowering the use of the writ of mandamus to compel the furnishing of cars and other facilities for transportation, also authorizes the use of that writ for the purpose of compelling the movement of traffic "at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper." As it was settled in the *Abilene* case that the right to question in the courts the rates established in accordance with the act to regulate commerce without previous resort, by complaint, to the commission, in order to determine their unreasonableness, would be destructive of the act, and therefore was not permissible, that ruling is equally applicable to the provision as to furnishing cars contained in § 23, which is here relied upon. But as we are required, for the determination of the case now before us, to consider the scope of the act to regulate commerce as now existing, as a result of the amendments of 1906, we shall not rest our conclusion alone upon the persuasive force of the reasoning which constrained to the conclusion announced in the *Abilene* case. Speaking generally, it is true to say that, prior to 1889, although the prohibitions of the act to regulate commerce as to preferences and discriminations were far reaching, the mechanism provided by the statute for the enforcement of orders of the commission on the subject, as well as those concerning a finding as to unreasonable rates, were deemed to be in many respects ineffective, or at least tardy in operation or unsatisfactory in prompt remedial results, and this because immediate effect was not given to the

orders of the commission, but the aid of judicial authority was required as a prerequisite for such result. Section 23, here relied upon, was not part of the original act, but, as we have said, was added thereto on March 2, 1889, for the obvious purpose of making the remedial processes of the act more speedy and efficacious. Now, it cannot in reason be questioned that among the purposes contemplated by the amendments adopted in 1906 was the curing of the presumed remedial inefficiency of the act by supplying efficient means for giving effect to the orders of the commission, made in the exertion of the authority conferred upon that body. To that end one of the amendments, § 15, gives operative effect to the orders of the commission without the sanction of previous judicial authority, and endows that body with the power, not only as to unreasonable rates, but as to practices found upon complaint to be unduly prejudicial and unjustly discriminatory, to correct the same by its order, which order should have effect within the period fixed in the statute, and, to enforce these provisions, penalties and forfeitures are provided. Sec. 16. It being demonstrable, as we have seen, that to give to § 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889. This conclusion being in reason impossible, it must follow that, construing the provisions of § 23 in the light of and in harmony with the amendments adopted in 1906, the remedy afforded by that section, in the cases which it embraces, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the commission, rendered within the lawful scope of its authority, until such orders are set aside by the commission or enjoined by the courts.

Nor is there anything in the contention that the decision in *Southern Ry. Co. v. Tift*, 206 U. S. 428, qualifies the ruling in the *Abilene case*, and is an authority supporting the right to resort to the courts in advance of action by the commission for relief against unreasonable rates or unjust discriminatory practices, which, from

their nature, primarily require action by the commission. While it is true that the original bill in the *Tift case* sought relief from alleged unreasonable rates before action by the commission, yet, as said by this court (p. 437):

"The Circuit Court granted no relief prejudicial to appellants on the original bill. It sent the parties to the Interstate Commerce Commission, where, upon sufficient pleadings, identical with those before the court, and upon testimony adduced upon the issues made, the decision was adverse to the appellants. This action of the commission, with its findings and conclusions, was presented to the Circuit Court, and it was upon these, in effect, the decree of the court was rendered. There was no demurrer to that petition, and the testimony taken before the commission was stipulated into the case, and the opinion of the court recites that, 'with equal meritorious purpose, counsel for respective parties agreed that this would stand for and be the hearing for final decree in equity.'"

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the Circuit Court with directions to set aside its judgment, and enter judgment dismissing the petition.

Reversed.

MR. JUSTICE HARLAN and MR. JUSTICE BREWER dissent.

ROBINSON *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

222 U. S. 506 (1912).

THE facts, are stated in the opinion.

Mr. Charles H. Leeds for plaintiff in error.

Mr. H. L. Bond, Jr., Mr. W. Irvine Cross and Mr. A. Hunter Boyd, Jr., for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In February, March and May, 1903, Robinson, the plaintiff in error, shipped eleven carloads of coal from Fairmont, West

Virginia, to points in other States, over the railroad of the Baltimore and Ohio Railroad Company, the defendant in error, and paid the rate thereon which was prescribed in a schedule published and filed conformably to the act to regulate interstate commerce and then in full force. By this schedule the rate was fifty cents more per ton when the coal was loaded into the car from wagons than when the loading was from a tipple. Robinson's shipments came under the higher rate, and the charges paid by him were \$150.00 in excess of what would have been exacted if his coal had been loaded from a tipple. Conceiving that the schedule unjustly discriminated between shipments loaded from tipples and those loaded from wagons, he brought, in the Circuit Court of Marion County, West Virginia, on April 19, 1906, an action against the railroad company to recover the excess so paid. The case was heard upon an agreed statement of facts, which set forth, with some detail, the matters just stated and recited that it embodied "all the facts and evidence in the cause." But the statement did not disclose, or even suggest, that the schedule had been the subject of a complaint to the Interstate Commerce Commission or had been found by the Commission to be unjustly discriminatory, or that the railroad company had been ordered by the Commission to desist from giving effect to the schedule or to make reparation to Robinson or any other shipper because of prior exactions thereunder. Being of opinion that, upon the agreed statement, Robinson was not entitled to recover, the court entered a judgment dismissing his action, and that judgment was affirmed by the Supreme Court of Appeals of the State. 64 W. Va. 406. He then sued out this writ of error upon the ground that, by the judgment of affirmance, he was denied rights specially set up under the act to regulate interstate commerce.

The first question to be considered is, whether, consistently with the provisions of that act, Robinson could maintain his action for reparation in the absence of an order by the Interstate Commerce Commission finding that the established schedule whereby the additional fifty cents per ton was exacted was unjustly discriminatory, determining what reparation should be made because of prior exactions thereunder, and directing the carrier to desist from such discrimination in the future, and to make the reparation indicated. It was contended by him in the Supreme Court of Appeals of the State, and is contended now, that the question should be answered in the affirmative because of the

provision in § 22 (Act of 1887) that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." But it must be ruled otherwise, and for these reasons:

The act, c. 104, 24 Stat. 379; c. 382, 25 Stat. 855; c. 61, 28 Stat. 643; c. 708, 32 Stat. 847, whilst prohibiting unreasonable charges, unjust discriminations and undue preferences by carriers subject to its provisions, also prescribed the manner in which that prohibition should be enforced; that is to say, the act laid upon every such carrier the duty of publishing and filing, in a prescribed mode, schedules of the rates to be charged for the transportation of property over its road, declared that the rates named in schedules so established should be conclusively deemed to be the legal rates until changed as provided in the act, forbade any deviation from them while they remained in effect, invested the Interstate Commerce Commission with authority to receive complaints against rates so established, and to inquire and find whether they were in any wise violative of the prohibitions of the act, and, if so, what, if any, injury had been done thereby to the person complaining or to others, and further authorized the Commission to direct the carrier to desist from any violation found to exist, and to make reparation for any injury found to have been done. Provision was also made for the enforcement of the order for reparation, by an action in the Circuit Court of the United States, if the carrier failed to comply with it.

Thus, for the purpose of preventing unreasonable charges, unjust discriminations and undue preferences, a system of establishing, maintaining and altering rate schedules and of redressing injuries resulting from their enforcement was adopted whereby publicity would be given to the rates, their application would be obligatory and uniform while they remained in effect, and the matter of their conformity to prescribed standards would be committed primarily to a single tribunal clothed with authority to investigate complaints and to order the correction of any non-conformity to those standards by an appropriate change in schedules and by due reparation to injured persons.

When the purpose of the act and the means selected for the accomplishment of that purpose are understood, it is altogether plain that the act contemplated that such an investigation and order by the designated tribunal, the Interstate Commerce Commission, should be a prerequisite to the right to seek rep-

aration in the courts because of exactions under an established schedule alleged to be violative of the prescribed standards. And this is so, because the existence and exercise of a right to maintain an action of that character, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the act was designed to secure.

In the case of *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440, where such a right was asserted and denied, it was said by this court:

"Indeed the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a con-

flict would arise which would render the enforcement of the act impossible."

It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper.

Of course, the provision in § 22, as also the provision in § 9, must be read in connection with other parts of the act and be interpreted with due regard to its manifest purpose, and, when that is done, it is apparent that neither provision recognizes or implies that an action for reparation, such as is here sought, may be maintained in any court, Federal or state, in the absence of an appropriate finding and order of the Commission. *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, *supra*, pp. 442, 446.

The next question to be considered is, whether judicial notice should have been taken of the decision of the Commission in *Glade Coal Co. v. Baltimore & Ohio Railroad Co.*, wherein, as it is said, the rate here in question was found to be unjustly discriminatory and the railroad company was directed to desist from its enforcement. The decision was rendered April 28, 1904, and authoritatively published in 10 I. C. C. 226, but was not mentioned in the pleadings or in the agreed statement of facts. In the Supreme Court of Appeals of the State it was contended that the decision should have been judicially noticed by the trial court, but the contention was rejected, and that ruling is now challenged as contravening the provision in § 14 of the act (25 Stat. 855), which reads: "The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be *competent evidence* of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof."

Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other

proof of their genuineness, but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. The ruling, therefore, was not in contravention of the statute.

The result, however, would have been the same had the decision been properly before the court. An examination of it discloses that it did not contain any finding or direction as to what, if any, reparation should be made because of prior exactions of the rate which it condemned. It did find that the complaining party in that proceeding had been injured by the refusal of the railroad company to furnish cars on certain occasions for the shipment of coal, and did direct that reparation therefor be made, but that is without bearing here.

It follows that the judgment must be affirmed, and it is so ordered.

Affirmed.

MITCHELL COAL AND COKE COMPANY v.
PENNSYLVANIA RAILROAD COMPANY.

230 U. S. 247 (1913).

The facts are stated in the opinion.

Mr. George S. Graham for plaintiff in error.

Mr. John G. Johnson and *Mr. Francis I. Gowen* for defendant in error.

MR. JUSTICE LAMAR delivered the opinion of the court.

On November 20, 1905, the Mitchell Coal and Coke Company brought suit in the Circuit Court of the United States for the Eastern District of Pennsylvania against the Pennsylvania Railroad for damages alleged to have been occasioned by the payment of rebates to the Altoona, Glen White, Millwood, Latrobe and Bolivar Companies. The complaint alleged that between April 1, 1897, and May 1, 1901, the plaintiff, in competition with these companies, made shipments of coal and coke over the Pennsylvania road from the Clearfield District to the same gen-

eral markets in other States and that, during all that time, the carrier paid rebates to these companies, pretending that the money given them was an allowance for transportation services rendered by them, in hauling cars over spur tracks between their mines and the railroad station.

The parties stipulated that the case should be submitted to a Referee, who should have the powers of a special master. His findings were in favor of the plaintiff. His report, modified as to the measure of damages, was confirmed (181 Fed. Rep. 403), but before judgment was entered thereon the carrier moved to dismiss the case because the court, as a Federal court, had no jurisdiction of the cause of action until after the Interstate Commerce Commission had passed upon the legality of the allowances and the reasonableness of the amount paid to shippers for hauling cars between their mines and the station. The motion was granted (183 Fed. Rep. 908), and the case was taken by writ of error to the Circuit Court of Appeals, which dismissed the case (192 Fed. Rep. 475) upon the ground that the question could only be reviewed by the Supreme Court of the United States. A writ of certiorari was denied (223 U. S. 733), and the plaintiff thereupon brought the case here by direct writ of error, the judge certifying the following as the jurisdictional question:

"Has the Circuit Court of the United States, in advance of any application to the Interstate Commerce Commission and action thereon by that body, jurisdiction to entertain an action of trespass brought by a shipper of coal and coke to recover damages because of alleged unlawful preferential rates accorded to other and competing shippers of coal and coke, when such alleged preferential rates are claimed to have resulted from payments made to such other shippers, which payments the plaintiff claimed were rebates from the published and filed freight rate, and the defendant claimed were made as compensation for services rendered by such shippers or for other accounts which justified it in making the same, and when it further appeared that such payments had been made pursuant to a practice of long standing, and that a number of shippers other than the plaintiff were interested in the question of the lawfulness thereof."

1. The plaintiff's cause of action for damages occasioned by the payment of illegal or unreasonable allowances was one which, under §§ 8 and 9 of the Commerce Act (24 Stat. 382), could only be brought in a District or Circuit Court of the United States. The motion to dismiss challenged the jurisdiction of the court,

as a Federal court, and its power "primarily to hear complaints concerning wrongs of the character of the one here complained of." *Texas &c. Ry. Co. v. Abilene Co.*, 204 U. S. 426, 442; *B. & O. R. R. v. Pitcairn Coal Co.*, 215 U. S. 481, 495; *Robinson v. B. & O.*, 222 U. S. 506. The order of dismissal was founded on the denial of jurisdiction, and this court has power to review that ruling. *Ira M. Hedges*, 218 U. S. 264, 270; *The Steamship Jefferson*, 215 U. S. 130. The case differs from *Darnell v. Illinois R. R.*, 225 U. S. 243. There the Commission had found that the rate was unreasonable. The demurrer, based on the failure to allege that a reparation order had been made in favor of the plaintiff, did not attack the jurisdiction of the court, as a Federal court, since the cause of action sought to be enforced was one which, if properly brought could, under the act of June 18, 1910 (36 Stat. 539, 554, c. 309), have been maintained either in a state or Federal court.

2. In the present case the motion to dismiss for want of jurisdiction was made at the end of the trial and was based, not upon the pleadings, but upon the evidence. It becomes necessary, therefore, to make a statement of the facts material to that issue: — The plaintiff, the Mitchell Coal and Coke Company, owned six coal mines in the Clearfield District, and between 1897 and May 1, 1901, shipped its products over the Pennsylvania Railroad in state and interstate commerce. During that time the provisions of the Commerce Act were constantly violated and there were many instances in which the carrier gave secret rates to shippers from whom it collected the full tariff and subsequently refunded the difference between the legal and the illegal rate. Many such rebates were paid to the plaintiff, the Mitchell Company, which in this case claimed the right to recover, as damages, the difference between these rebates paid to it and what it claimed were the additional rebates paid to the Altoona and other companies mentioned in the declaration. The Referee found that, for a part of the time, 70 per cent. of plaintiff's shipments had been made at secret rates, and held, citing *Pa. R.R. v. International Co.*, 173 Fed. Rep. 1, 9, that, as to this tonnage, the plaintiff was as much a violator of the statute as was the carrier and that no cause of action arising out of this illegal contract would be enforced by the courts. He therefore limited the inquiry to a consideration of the damages in respect to that part of the plaintiff's shipments on which no rebates had been paid.

From the Referee's report, and the testimony returned therewith, it appears that Clearfield District is the name given to a

large coal field reached by the lines of the Pennsylvania Railroad. In this district there were many mines — some near the railroad and others at considerable distances therefrom, but all reached by lateral lines or spur tracks, over which cars were carried to and from the mines. This Clearfield District was treated as a single shipping station, and the rates from all points therein were the same where coal was transported to the same point beyond the State. The published tariff named the rate from station to destination, but it was uniformly construed to include the haul from the mine. The published rate was so applied on all shipments made by the plaintiff as well as on those made by the Altoona and other companies named in the complaint.

It further appeared that to these companies the carrier paid what is called a trackage or lateral allowance, claiming that it was compensation allowed them for hauling cars from their mines to the station. The defendant's contention that there was no concealment of these payments is controverted by the plaintiff, which insists that it had no knowledge of such payments until 1898, when its officers were informed that the railway was paying some companies 10 cents a ton for such services. The Mitchell Company, the plaintiff, thereupon bought an engine to be used for that purpose at its Gallitzin mine and with this engine hauled cars, loaded and empty, between that mine and the station. For this work it demanded that the defendant should pay the same lateral allowance of 10 cents a ton that the railroad paid other companies for similar services. The carrier contended that it was itself prepared to do the switching at the Gallitzin mine, though, on account of dissimilarity of conditions, it could not economically do so at the Altoona and other mines referred to in the complaint. It therefore declined to pay a lateral allowance to the plaintiff, but offered to continue to treat this haul as included in the rate and to do that work without extra charge to the Mitchell Company. The plaintiff then offered to do the hauling for less than 10 cents, the exact amount not appearing. The proposition having been declined in 1899, the plaintiff, on November 20, 1905, brought this suit, offering evidence to show that in some cases the allowance was as high as 18 cents a ton instead of 10 cents, as it had previously understood.

In addition to the Gallitzin mine, the plaintiff owned five others in the Clearfield District. They were located at points from 1,100 to 3,000 feet from the railroad and were reached by spur tracks belonging to the plaintiff, over which cars were hauled

by the locomotives belonging to the Pennsylvania Railroad. For this service the carrier made no extra charge, treating it as included in the rate, though the tariff published the rate as from station to destination.

The mines of the Altoona, Glen White and Millwood Companies were located in the Clearfield District, while those of the Latrobe and Bolivar Companies were near by in the Latrobe District.

The Millwood was reached by a narrow gauge track, over which cars were hauled by the coal company's narrow gauge engines. For doing that work it was paid a lateral allowance of 15 cents a ton until April, 1899, and after that date 10 cents a ton.

The Glen White mine was about three miles from the main road and was reached by a spur having light rails, steep grades and sharp curves, over which the evidence tended to show that the engines of the railroad could not be safely or economically operated. This company transported the coal cars with its own engine and for doing that work the defendant paid it a lateral allowance of 15 cents a ton. On December 28, 1901 (subsequent to the transactions involved in this litigation), the carrier gave notice that it would discontinue lateral allowances on coke, but would allow 15 cents per ton on coal.

The Altoona mine was reached by a spur track, over which, with its own engines, the Altoona Company hauled cars and was paid a lateral allowance of 13 cents on coal and 10 cents on coke to points on the Hollidaysburg Branch, and 18 cents on coal and 20 cents on coke to points east of Altoona. On December 28, 1901, this lateral allowance on coal was discontinued and that on coke reduced to 12 cents a ton. On January 1, 1902, all lateral allowances were discontinued.

Inasmuch as the payments to the Altoona were larger than those to any other coal company, the plaintiff claimed that they were the legal measure by which damages were to be assessed. The evidence was therefore specially directed to the situation at this mine, which was a little over three miles in an air line from the railroad and eight hundred feet above the station level. The grade was, not only very steep, but it was necessary to make use of three switchbacks in order to reach the elevation of the mine. The line was thus lengthened so as to be about 5 miles in length. The curves on this track were very sharp; the rails were light, and only specially constructed engines could be used. There was evidence

that before the Pennsylvania's locomotives could have been operated over this spur it would have been necessary to put in heavy rails, strengthen the culverts and realign the track. Owing to the steep grade only four cars could be hauled at a time, and it required from three to six times as long to do the same amount of transportation work as at the Gallitzin mine.

3. The plaintiff insists that these facts demonstrate that the payments to the Altoona and other companies were not measured by the value of the track or locomotive, or by the cost of the service rendered, but were unreasonable in amount, were arbitrarily fixed, lowered or withdrawn and constituted a mere cover for rebating. On the other hand, the defendant insisted that, though bound to haul the cars to and from the mines, it could not economically do the work on account of the physical conditions at the Altoona, Millwood and Glen White mines and that it, therefore, employed those companies to perform that transportation service, paying them therefor an allowance which is *prima facie* reasonable and must be so treated by the courts until the Commission has determined that it was excessive or constituted an unjust discrimination.

On this hearing, involving a matter of jurisdiction, we cannot pass upon these questions which go to the merits of the controversy. But these claims of the parties emphasize the fact that there are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable. But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character — to the destruction of the uniformity in rate and practice which was the cardinal object of the statute.

4. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in the *Abilene*, *Pitcairn* and *Robinson Cases* and is referred to here

because this record and that in *Pennsylvania R. R. v. International Co.*, ante, p. 184, just decided, furnish a striking illustration of the results which would follow if the reasonableness of an allowance could be decided by different tribunals. Both cases involve the payment of 18 cents a ton to the Altoona Company during the same period and for identically the same reasons. In both the plaintiff insisted that the payment was a rebate, and the carrier that it was compensation for services rendered. In the *International Case* the judge treated the Altoona allowance as lawful and reasonable. In this case the Referee found that it was a rebate, while the trial judge, in passing on exceptions to the report, held that it was a question of fact about which the evidence was conflicting and thereupon approved the Referee's report. Treating it as a question of fact, there may have been sufficient testimony to sustain the finding in both instances, although the conclusion was diametrically opposite. And, applying the rule that appellate courts will not disturb findings of fact where the evidence is conflicting, contradictory judgments might have been affirmed and one plaintiff could have been awarded damages on the theory that the Altoona allowance was unlawful and the other been mulcted in cost because the Altoona allowance was legal. This and like considerations compelled the holding that, as the courts have no primary jurisdiction to fix rates, neither can they do so at the suit of a single plaintiff who claims to have been damaged because an allowance paid its competitors was unreasonable in amount.

It is argued that this conclusion ignores §§ 9 and 22, which give the shipper the option of suing in the courts or applying to the Commission. The same argument was made and answered in the *Abilene Case* by showing that to permit suits based on the charge that a particular practice was unreasonable, without previous action by the Commission, would repeal the many provisions of the statute requiring uniformity and equality. For, manifestly, such uniformity and equality cannot be secured by separate suits before separate tribunals involving the reasonableness of a rate or practice. The evidence might vary and, of course, the verdicts would vary, with the result that one shipper would succeed before one jury and another fail before a different jury, where the reasonableness of the same practice was involved. Manifestly, different verdicts would occasion inequality between the two shippers and it is equally manifest that if the Commission had made one order of which both could avail themselves, there would have been one finding, of which one, two or a score of shippers could equally

avail themselves. The claim that this conclusion nullifies § 9 is concretely answered by the fact that the court has just decided to the contrary in *Pennsylvania R. R. v. International Coal Company*. There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case, — thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.

5. It is argued that under the *Abilene*, *Robinson* and *Pitcairn Cases* this may be true as to existing rates in which the public have an interest, but it is urged that a claim based upon the unreasonableness of past rates and discontinued practices raises a judicial question, of which the courts and not the Commission have jurisdiction.

There are several answers to this proposition. In the first place, the plaintiff cannot claim under the act and against it. To say the least, it is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. *I. C. C. v. B. & O. R. R.*, 145 U. S. 263, 275. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust dis-

crimination or as an undue preference. *Texas &c. Ry. v. Cisco Oil Mill*, 204 U. S. 449; *Texas &c. Ry. v. Abilene Co.*, 204 U. S. 426, 444; *Southern Ry. v. Tift*, 206 U. S. 428, 437; *United States v. Pacific & Arctic R. R.*, 228 U. S. 87. Such orders, so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage — as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing (March 2, 1889, 25 Stat. 855, 859, c. 382).

In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and practices. In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal. For, if at the suit of one shipper, a court could hold a past rate or allowance to have been unreasonable and award damages accordingly, it is manifest that such shipper would secure a belated but undue preference over others who had not sued and could not avail themselves of the verdict. But more than this — to permit separate suits and separate findings would not only destroy the equality which the statute intended should be permanent, even after the rates had been changed, but it would bring about direct conflict in the administration of the law. Under the statute the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission the carrier and shippers are alike bound to treat them as lawful. After the rate had been abandoned the carrier is still obliged to treat it as having been lawful, and cannot refund what had been collected under it until the Commission determines that what was apparently reasonable had in fact been unreasonable. But such a determination cannot be made by the courts, for they would not only have first to exercise an administrative function and make a rate by which to measure the reasonableness of the charge collected, but they would have to go further and treat as unreasonable a rate, past or present, which the statute had declared should be deemed lawful until it had been held to be otherwise by the Commission.

As to past and present practices for allowances, the Commission has the same power and there is the same necessity to take preliminary action. This was recognized in *Texas &c. Ry. v. Abilene Co.*, 204 U. S. 426, where, after considering §§ 8 and 22, relating to jurisdiction and the statutory and common law remedy, it was said that although a railroad might alter its rates voluntarily or in obedience to an order of the Commission, yet it can "not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." A contrary ruling would upset a useful, time-saving, economical and established practice. For in accordance with this construction of the act the Commission, after the abandonment of a rate, has repeatedly received and heard complaints and, upon finding that it had been unreasonable, has granted reparation accordingly. See *Arkansas Fuel Co. v. C., M. & St. P. Ry. Co.*, 16 I. C. C. 95, 98; *Allen & Co. v. C., M. & St. P. Ry. Co.*, 16 I. C. C. 293, 295.

The plaintiff insists, however, that all these reasons are answered by the decision in *Wight v. United States*, 167 U. S. 512, where the court, without preliminary action by the Commission, held that an allowance paid a consignee for hauling his freight in wagons from depot to warehouse was a rebate and thereupon inflicted the statutory punishment.

But that case did not involve any question of reasonableness of rate or allowance. Nor was the court there called on to indirectly exercise rate-regulating power, but only to pass upon the question of fact as to whether, as charged in the indictment, the defendant had paid a secret rebate to a favored consignee. It appeared that the carrier's published rate of 15 cents included the haul from Cincinnati to the yard in Pittsburg. Neither by its terms, nor by general practice, did that rate include delivery at warehouses in the city and distant from the railroad tracks. Not having undertaken to furnish free cartage, it was unlawful for the carrier to perform that service for one patron and not for all others. Paying the favored consignee for rendering a service the carrier was not bound to furnish, was a gift — a rebate — a thing *ipso facto* illegal and prohibited by the statute and for which the guilty carrier was subject to criminal indictment, and for which damages could have been awarded on the civil side of the court. It was therefore not necessary to have a preliminary ruling by the Com-

mission because the statute itself prohibited the payment of rebates and the courts could apply the law accordingly.

6. The plaintiff thereupon insists that even on this view of the case the judgment should be reversed, claiming that the payments here were of that prohibited character, so that even if the allowance was reasonable in amount, its payment was nevertheless unlawful because (a) given for a service not included in the rate and (b) not mentioned in the tariff.

Under the Elkins Act of February 19, 1903, 32 Stat. 847, c. 708 (*United States v. Chicago & A. Ry.*, 148 Fed. Rep. 646; *S. C.*, 156 Fed. Rep. 558, affirmed by a divided court, 212 U. S. 563), and under the Hepburn Act of June 29, 1906, 34 Stat. 584, c. 3591 (*Victor Co. v. Atchison Ry.*, 14 I. C. C. 120) it has been held that the carrier must give notice in the tariff of free cartage, lighterage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service. But the present case is not to be governed by those statutes, but by the law of force between 1897 and 1901, when the transactions complained of took place. At that time the Commerce Act¹ required the carrier to give notice of every charge it would make against the shipper. But the statute was not construed to compel the railroad to publish what free cartage or accessorial service it would

¹ "Sec. 6. . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force . . . , and shall also state separately the terminal charges and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. . . .

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party." (Act of February 4, 1887, 24 Stat. 379, 380, 381.)

furnish (*Detroit v. United States*, 167 U. S. 646), nor what sums it would pay shippers for transportation service rendered by them to the carrier. Failure to publish these items could, however, easily lead to unjust discrimination, and the court, in the case last cited, held that the Commission might, by a general order, require such matters to be published in the rate sheet. We are not cited to any such order for the period now under investigation, and, so far as we can discover, by the general and public custom of all carriers, acquiesced in by the Commission, the tariffs at that time uniformly omitted any statement of allowances that would be paid to the shipper for the use of private cars, or private tracks, or for transportation service in switching, hauling, lightering or other work, included in the rate, but actually performed by the shipper.

But although the statute then of force was not construed to require the publication of allowances, their payment was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate.

Such undoubtedly it would have been if naming the rate from station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield District was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all other located in the Clearfield District.

Inasmuch as this rate included the haul the Railroad was bound to transport the coal from the mouth of the mines, and could use

its own engines for that purpose or it could employ the Coal Companies to render that service, paying them proper compensation therefor. In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regulating body. The courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful.

That station rates may be applied from mill or mine reached by spur tracks is recognized by the ruling of the Commission in the *Tap Line Cases*, 23 I. C. C. 277, where, in dealing with the practice of paying an allowance for hauling lumber from sawmills, the Commission said (p. 293):

"In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as three miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as three miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than three miles distant the transportation offered by the trunk line commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for

which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without discrimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work." 23 I. C. C. Rep. 277.

In view of this ruling it is apparent that lateral allowances might have been lawfully paid. They became unlawful only when unreasonable. Whether they were so or not was a rate-making question as to which parties were directly at issue, and which the courts had no jurisdiction to determine so far as it concerned the allowances to the Altoona, Millwood and Glen White mines. Having no jurisdiction, the parties could not by consent give it to the court, to the judge, nor to the Referee. And if, as claimed, the stipulation to submit the case to the Referee estops the defendant from insisting on the plea of the statute of limitations, that, with all other relevant issues, can then be determined, if the Commission decides that the allowance was unlawful, and the carrier has no other defense.

7. But the situation of the Bolivar and Latrobe Companies was very different from that at the Altoona, Glen White and Millwood mines, and a different conclusion must, therefore, follow. The Latrobe and Bolivar Companies' mines were located in the Latrobe District, where the rates to eastern points were about 20 cents higher than from the Clearfield District, except that for a part of the time they were the same, though the shipments were then small by comparison with those from the Clearfield District. During that period the plaintiff shipped in competition with the Latrobe and Bolivar Companies. These companies owned no engines, and they hauled no cars between mine and station. That work was included in the rate, and the Pennsylvania did the hauling with its own locomotives and crews. It therefore owed nothing to the Latrobe and Bolivar Companies for the service which the carrier itself performed, and the so-called allowance, regardless of the amount, was a mere gift — a rebate, absolutely forbidden

by the statute and *ipso facto* illegal. Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured. The decision just rendered in *International Coal Company v. Pennsylvania Railroad* makes it unnecessary further to discuss this branch of the case. For the court undoubtedly had jurisdiction to proceed with this branch of the case.

The judgment, therefore, must be reversed in so far as the action is based upon payments to the Latrobe and Bolivar Companies, and affirmed in so far as based upon payments to the Altoona, Glen White and Millwood Companies. But owing to the peculiar facts of this case, the unsettled state of the law at the time the suit was begun and the failure of the defendant to make the jurisdictional point *in limine* so that the plaintiff could then have presented its claim to the Commission and obtained an order as to the reasonableness of the practice or allowance, — direction is given that the dismissal be stayed so as to give the plaintiff a reasonable opportunity within which to apply to the Commission for a ruling as to the reasonableness of the practice and the allowance involved; and, if in favor of the plaintiff, with the right to proceed with the trial of the cause in the District Court, in which the defendant shall have the right to be heard on its plea of the statute of limitations as of the time the suit was filed and any other defense which it may have.

*Affirmed and modified in part, and in part reversed.*¹

MORRISDALE COAL COMPANY v. PENNSYLVANIA
RAILROAD COMPANY.

230 U. S. 304 (1913).

The facts are stated in the opinion.

Mr. William A. Glasgow, Jr., with whom *Mr. Chester N. Farr, Jr.*, was on the brief, for appellant.

Mr. John G. Johnson, with whom *Mr. Frederic D. McKenney* and *Mr. Francis I. Gowen* were on the brief, for appellee.

¹ The dissenting opinion of MR. JUSTICE PITNEY is omitted. — Ed.

MR. JUSTICE LAMAR delivered the opinion of the court.

There are a large number of coal mines in the Clearfield District, Tyrone Division of the Coal Region, in the State of Pennsylvania. Between January 1, 1900, and December 31, 1905, the total output of the mines in the Clearfield District averaged 18,500 tons per day. When there was a car shortage, the Pennsylvania Railroad allotted to each mine a percentage of cars assigned to the District, calculated according to the capacity of the mine.

On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent.

In 1908 the Morrisdale Company brought suit against the Railroad for damages alleged to have been occasioned by an unfair distribution of cars to it and an undue allotment of cars to its competitor, the Berwind-White Company.

Alleging that in violation of its duty to see that no undue preference was given to any other person or corporation in the District, the carrier failed to assign to the plaintiff its *fair proportion of the entire number of coal cars of the Railroad Company*, to which plaintiff was entitled and that this failure continued from the beginning of 1900 to the close of 1905, the effect of which was to subject plaintiff to unreasonable prejudice with respect to the facilities for shipping coal as contrasted with the facilities furnished other competitors in the Clearfield District, and as a result of the unfair discrimination and the failure to furnish a proper allotment of cars and equal facilities, plaintiff was obliged to buy coal at various times in the outside market at prices then prevailing in order to fill its contracts previously entered into — to its damage \$250,000. The defendant entered a plea of not guilty and *actio non accrevit infra sex annos*. On the trial, the jury found that the exhibit showing damages of \$67,156.07 was correct. "If the court shall be of opinion that the questions of law involved in the case are in whole or in part with the plaintiff, we find for the plaintiff. If, however, the court be of opinion that the questions of law are with the defendant, then we find in favor of the defendant."

There was no conflict in the evidence, and in view of the admissions of the plaintiff incorporated in the record, the facts can be briefly stated.

The capacity of plaintiff's mine was 4.8 per cent. of the output

of the Clearfield region, and having been furnished access to the books of the carrier, it made up a statement showing that during 23 months between March, 1902, and December 31, 1905, in which there was a car shortage, the Morrisdale Company received less than its 4.8 of all the coal cars in the Clearfield region, while the Berwind-White Company received more than its 18 per cent. of all the coal cars in the region. This was admitted by the Railroad, which insisted that during periods of car shortage it divided the cars into four classes:

1. Private cars, belonging to persons or corporations operating mines in the district;
2. Cars of foreign railroads consigned to designated mines to be loaded with fuel for such foreign railroads;
3. Pennsylvania Railroad fuel cars, consigned to designated mines to be loaded with fuel for railroad use;
4. The balance, or System cars, available for general use, it distributed among the various mines in the proportion their capacity bore to the total output of the Clearfield region, the plaintiff being allotted its due proportion, or 4.8 per cent. thereof.

The Railroad explained that the apparent excess of cars furnished the Berwind-White Company during the 23 months referred to was due to the fact that that company owned a large number of private cars on which it appeared that wheelage was paid and submitted the following table showing the number and character of cars in the Clearfield Region during those years:

	Individual	Company Coal	System	Foreign	Commercial Box	Total
1902 Cars placed	14,221	16,119	31,048	22,544	11	83,943
1903 Cars placed	20,483	15,614	20,947	24,222	13	81,279
1904 Cars placed	16,705	11,477	21,888	14,568	12	64,650
1905 Cars placed	26,716	22,812	24,769	5,542	374	80,213
Total	78,125	66,022	98,652	66,876	410	310,085

During the trial plaintiff admitted that there had been no intentional discrimination against it, but contended that its statement was made up from the books on the basis of what it considered to be the law of the case, under which *all cars available for shipment of coal should be counted in the distribution.*

Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them

against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if Fuel cars of the Pennsylvania Railroad and Fuel cars of foreign railroads, consigned to particular mines were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or system cars.

The Circuit Court dismissed the case on the ground that, without preliminary action by the Commission, the court had no jurisdiction of a suit for damages alleged to be occasioned by undue discrimination against the plaintiff and undue preference in favor of its competitor.

The plaintiff took the case to the Circuit Court of Appeals, complaining of this ruling and further assigning error in that the court failed to enter judgment in its favor on the special verdict.

The Circuit Court of Appeals held, one judge dissenting, that the plaintiff had the option of taking the question of jurisdiction by direct writ of error to the Supreme Court of the United States, or it could take the whole case, including the matter of jurisdiction, to the Circuit Court of Appeals. That court, thereupon, considered the whole record, and (one judge dissenting) affirmed the judgment of the Circuit Court on the ground that the Circuit Court had no jurisdiction as a Federal court until after the Commission had passed on the reasonableness of the method of car distribution. The case was brought here, the only question presented by the record being whether the Circuit Court as a Federal court had jurisdiction.

The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 397) that the question was in a state of flux, and an examination of the decision in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the pri-

vate corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. *Traer v. Chicago &c. R. R.*, 13 I. C. C. 451; *Hillsdale Coal Co. v. Pennsylvania R. R.*, 19 I. C. C. 356, 372; *Jacoby v. Pennsylvania R. R.*, 19 I. C. C. 392; *Minds v. Pennsylvania R. R.*, 20 I. C. C. 52.

It was, however, recognized that there could be no hard and fast rule and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to haul certain articles of merchandise in order to supply communities with necessities of life. *Parks v. Cincinnati &c. Ry.*, 10 I. C. C. 47; *Thompson v. Pennsylvania R. R.*, 10 I. C. C. 640.

These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission. It was distinctly so ruled in the *Pitcairn Case*, 215 U. S. 481, and in *I. C. C. v. Illinois Central*, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of allotting cars neither can it do so as an incident to an action for damages.

In view of the decision in the *Abilene, Pitcairn and Robinson Cases* it is unnecessary again to discuss the statute or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.

The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule — and that, therefore, without any order of the Commission it is entitled to institute a suit for the recovery of damages resulting from the failure to distribute cars according to the method established by the Railroad itself.

The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable and that *all cars in the district* should be distributed according to the capacity of the mine without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time was, as we have seen, an administrative question and to be decided by the Commission as preliminary to the right to maintain this suit. The Circuit Court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.

It is argued in the plaintiff's brief that if this view of the law should be sustained the case should not be dismissed but stayed until the plaintiff could apply to the Commission and obtain a ruling on the question as to whether the method adopted by the Pennsylvania Railroad was not, during the years 1900 to 1906 unjustly discriminatory. Attention is called to *Southern Ry. v. Tift*, 206 U. S. 428, 434, which it is said would support such a provision in the mandate. In that case the shippers filed, on April 14, 1903, a bill to enjoin an advance in rate. The injunction was refused and the advance went into effect. The cause was stayed while the complainants were pressing their application for an order from the Commission that the rates were unreasonable. Its report was in their favor and on it the Circuit Court made an order of restitution (206 U. S. 436). But, in that case the statute of limitations had not run when the bill was filed, when the stay order was granted, nor when the application was made to the Commission; while in the present case the plaintiff was barred of the right to apply to the Commission at the date the suit was filed in the United States Circuit Court. The damages which were claimed arose from a failure to deliver cars prior to Dec. 31, 1905. The suit was brought July 17, 1908, more than two and a half years later and after the passage of the act of June 29, 1906, 34 Stat. 584, 590, c. 3591, that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued and not after and a petition for

the enforcement of an order shall be filed in the Circuit Court within one year from the date of the order and not afterwards; Provided that claims accrued prior to the passage of this act may be presented within one year."

The provisions of this statute would prevent the modification asked for, and the judgment is

Affirmed.

MR. JUSTICE PITNEY dissented.

TEXAS & PACIFIC RAILWAY COMPANY v. AMERICAN
TIE & TIMBER CO., LTD.

234 U. S. 138 (1914).

The facts are stated in the opinion.

Mr. Hiram Glass, with whom *Mr. W. L. Hall* was on the brief, for plaintiff in error.

Mr. Rollin W. Rodgers, with whom *Mr. R. P. Dorough* was on the brief, for defendant in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Basing its cause of action on the Act to Regulate Commerce the American Tie & Timber Company, defendant in error, hereafter called the Tie Company, commenced suits in the Circuit Court of the United States for the Northern District of Texas against the Texas & Pacific Railway Company, plaintiff in error, and the Kansas City Southern Railway Company to recover damages alleged to have resulted from the refusal of the railway companies to furnish, in September, October and November, 1907, cars for the loading of oak railway crossties at various points on the line of the railways in Arkansas and Louisiana for shipment to Linwood, Kansas, beyond the lines of the companies. The cases were consolidated for trial, subject to a plea to the jurisdiction filed by the Kansas City Southern Railway Company, which plea was afterward sustained and the suit as to that company dismissed. There was a trial, however, as to the Texas & Pacific Railway Company, resulting in a verdict and judgment thereon for \$17,112.33, and the writ of error now before us is

prosecuted by the Railway Company to a judgment of the court below affirming the trial court. (190 Fed. Rep. 1022.)

At the close of the evidence a motion was made to dismiss "because under the facts and circumstances now disclosed by the record, and compatibly with the act of Congress of the United States to regulate interstate commerce, this court has no power to consider and decide the subject matters which are complained of, or to award the relief prayed for by plaintiff." The denial of this motion is assigned as error and we come at once to consider it and state only so much of the pleadings and evidence as is necessary to adequately present the issue to be decided.

The amended petition after averring that the Tie Company was a Louisiana corporation and that the Railway Company was a corporation organized under the laws of the United States, alleged in substance that in 1901 the Railway Company issued and filed with the Interstate Commerce Commission "its joint through lumber tariff, T. & P. No. 8500-H, applying on lumber, all kinds (except Walnut and Cherry), lath and shingles and articles taking same rates from points on the Texas & Pacific Railway Co. to points in Kansas," by which a joint through rate of twenty-four cents per hundred pounds was put into effect from points on the Railway Company's line in Arkansas and Louisiana to Linwood, Kansas, "on, amongst other things, oak lumber," which rate it was averred had been continuously in effect from the date of the filing of the said tariff up to the happening of the events complained of.

It was averred that on July 23, 1907, the Tie Company entered into a contract with the Union Pacific Railway Company to deliver to said company f. o. b. cars Linwood, Kansas, 150,000 oak railway crossties of specified dimensions at the rate of fifteen thousand per month, beginning on or before October 1, 1907, at the price of 86 cents per tie, which contract was by its terms based on the rate of 24 cents per hundredweight fixed in the tariff filed as above stated in 1901. That for the purpose of performing said contract the Tie Company accumulated at stations on the Railway Company's line in Arkansas and Louisiana 44,541 oak crossties for shipment to Linwood, Kansas, and on October 10, 1907, requested the railway to furnish cars for the loading of the crossties at such points. It was alleged that after furnishing three cars, which were loaded by the Railway Company and shipped at the rate of 24 cents per hundred pounds, the Railway Company refused to provide further cars or to receive the cross-

ties for shipment upon the ground, as stated by it, that it had no through rate applicable to oak railway crossties from the several points on its line to Linwood, Kansas. The petition charged, however, that the joint through lumber tariff above referred to and the rate of 24 cents thereby established included oak ties and that the railway's refusal to provide cars and to carry the ties at its published rate was an unjust and unreasonable discrimination against the Tie Company, against the several places on the Railway Company's line where the ties had been accumulated and against the ties as an article of commerce, which discrimination, it was averred, was practiced by the Railway Company with the object of preventing the movement of the crossties to points beyond its line and of thus compelling the Tie Company to sell the ties which it had accumulated to the Railway Company. It was alleged that the refusal to transport the ties had resulted in unreasonable prejudice and disadvantage to the Tie Company and to the traffic in ties, and in benefit to the Railway Company as a purchaser and consumer of crossties, all of which constituted a violation of the Act to Regulate Commerce. It was averred that in consequence of the refusal of the Railway to furnish the cars and the resulting inability of the Tie Company to deliver the ties to the Union Pacific Railway under the contract, that company had cancelled the contract to buy the ties. And the amount sought to be recovered was alleged to be the loss resulting to the Tie Company consequent on such cancellation, together with punitive damages based on the "wilful, wanton and malicious" conduct on the part of the Railway Company, and a reasonable attorney's fee.

The Railway Company besides denying generally the allegations of the amended petition alleged that its joint through lumber tariff did not include a rate on oak railway crossties, but that crossties were a separate and distinct and well-recognized freight commodity, and that at the time mentioned in the petition it had not filed with the Interstate Commerce Commission any tariff under which it could lawfully accept for interstate shipment, at a through rate, the crossties offered by the Tie Company. The answer further denied that its failure to have in effect such a rate was a discrimination against crossties or the Tie Company or any locality, and alleged that oak crossties had never before been offered to it in Arkansas and Louisiana for shipment to interstate points on its lines or connections so as to render it advisable to establish such a rate. It was averred that when the

Railway Company first learned, in September, 1907, of the purpose of the Tie Company to ship crossties it at once notified the Tie Company that it had no through rate on ties and therefore would not be able to offer such a rate but would seek to establish a through rate of fifty cents per hundredweight if sufficient time was allowed it to give the public notices of the filing of the tariff as required by the statute. It was then alleged that thereafter the first intimation that the Railway Company had of the purposes of the Tie Company was a letter transmitted to one of its officers from the Interstate Commerce Commission informing the Railway Company of the fact that the Tie Company had filed an informal complaint with the Commission on the ground that although the Railway Company's tariff on lumber embraced crossties, it had announced its intention not to receive them under the lumber schedule, and protesting in advance against permitting the Railway Company to file a specific tariff on crossties at fifty cents per hundredweight, because, as compared with the 24 cent lumber rate, it would be unreasonable. That at once to avoid difficulty the Railway Company applied to the Interstate Commerce Commission to be allowed immediately to put into effect a cross-tie rate at 24 cents per hundred pounds, the same as the lumber rate, and such request was refused by the Commission. Request was then made to put in such a rate after five days' notice, which was likewise refused, and thereupon in January, 1908, the Railway Company issued and filed with the Interstate Commerce Commission a joint through lumber tariff amended so as to include at the lumber rate "wood railroad crossties, all kinds, car loads." The answer then charged that at no time until such tariff became effective, February 13, 1908, could the Railway Company have lawfully accepted and carried oak railway crossties under the provisions of the Act to Regulate Commerce. Referring to an averment in the petition concerning the acceptance of three cars of crossties at about this time for shipment at the lumber rate, the answer averred that if the facts were true it furnished no basis for recovery, as the receipt of the ties inadvertently or otherwise in the absence of a rate would have been a violation of law and afforded no ground for inferring the obligation to continue to do so, and besides did not aid the plaintiff's case, which was based upon the refusal of the Railway Company to take freight at an established and existing rate, not upon any supposed obligation by estoppel to do so when there was no established rate. And by an amendment to the answer

it was insisted that under § 9 of the Act to Regulate Commerce the plaintiff could not prosecute its action because by making a complaint, as it had done, to the Interstate Commerce Commission concerning the failure to treat the lumber tariff as embracing a rate on crossties, the plaintiff had elected to proceed before the Commission.

The evidence at the trial tended to support the allegations of the amended petition as to the making of the contract with the Union Pacific Railway Company, the accumulation of crossties at the several stations on the Railway's line, the request for cars for the shipment of the ties to Linwood, Kansas, the refusal of the Railway to provide the cars, the cancellation of the contract by the Union Pacific Railway Company, and the consequent loss to the Tie Company. The Railway Company's joint through lumber tariff was introduced in evidence and it was not disputed that by it a rate of 24 cents per 100 pounds was established on oak lumber and that oak railway crossties were not specifically mentioned. The Railway Company also introduced in evidence the correspondence between it and the Interstate Commerce Commission showing among other things the request to be allowed to put immediately into effect the cross-tie rate and the refusal of the Commission to grant the request, and the other facts and circumstances stated in the answer. It is not disputable that the pivotal question in the case was whether oak railway crossties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business as developed in the testimony it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy and upon which its decision therefore depends.

There is no room for controversy that the law required a tariff and therefore if there was no tariff on crossties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included crossties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which establish that for the preservation of the uniformity which it was the purpose of the Act to

Regulate Commerce to secure, the courts may not as an original question exert authority over subjects which primarily come with the jurisdiction of the Commission. *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Balt. & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co.*, 215 U. S. 481; *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247; *Morrisdale Coal Co. v. Penna. R. R. Co.*, 230 U. S. 304. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(a) The foundation upon which the doctrine rests, it is insisted, is the necessity of a uniform enforcement of the Interstate Commerce Act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the Act to Regulate Commerce, announced and enforced in the *Abilene* and other cases, has here no application because it is so plain that oak crossties were included in the lumber rate as fixed in the tariff of the Railway Company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves since on the face of the record it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether crossties were included in the filed lumber tariff. And indeed the same demonstration arises from a consideration of some decided cases, as, for instance, *American Tie & Timber Company v. Kansas City So. Ry. Co. et al.*, 175 Fed. Rep. 28, 33, presumably a report of this case, where it appears that at the first hearing the trial judge was so clearly of the opinion that crossties were not lumber that he so charged the jury and directed a verdict for the Railroad Company. See also *Greason v. St. Louis & c. R. Co.*, 112 Mo. App. 116, where it is apparent that the same conclusion was reached.

(b) Because the question has been determined by the Interstate Commerce Commission in *Reynolds v. Railway Co.*, 1 I. C. C. Rep. 600, 685. An examination of that report, however, discloses that the railway had in effect a published rate on crossties *eo nomine* and the complaint was that it was unreasonable because it was higher than the rate on lumber. The ruling of the Commission was not that the lumber rate included a rate on ties, but that the rate on ties was unreasonable as compared with the lumber rate and should be reduced.

(c) Because the Railway Company by loading and carrying the three cars of ties under the 24-cent rate had itself recognized the applicability of the lumber rate to crossties and was concluded thereby. But without stopping to consider the tendency of the proof establishing the want of foundation for the proposition we think it is wanting in merit for this obvious reason: If, as we have seen, the question of whether crossties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was such that the Railway Company could not do by indirection that which the statute permitted it to do only by compliance with the law, that is, filing its tariffs in the regular way. Nothing could better serve to demonstrate this self-evident truth than by recurring to the fact that at the very inception of the controversy the request made by the Railway Company to the Interstate Commerce Commission to be allowed to immediately put in the rate on crossties was refused by that body.

(d) Because the Railway Company did not refuse to transport the ties in good faith and insisted upon the absence of a scheduled rate simply as a pretext and device for preventing the shipment of the ties and their delivery in performance of the contract with the Union Pacific Railway, and with the ulterior and wrongful motive of keeping the ties on its line so as to be able to purchase them itself from the Tie Company. But without pausing to do more than direct attention to the fact that this proposition is necessarily disposed of by what we have said, that is, by the lawfulness, in view of the state of the existing and filed tariff, of the refusal until the Commission had acted, we think all the contentions under this last head are completely answered by the statement that the suit was based upon the unlawfulness of the action of the Railway Company in refusing to carry the ties in view of the filed tariffs, and therefore the contentions are not open for our consideration.

It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction and therefore it is our duty to reverse.

Reversed.

MR. JUSTICE PITNEY dissents.

VULCAN COAL & MINING COMPANY *v.* ILLINOIS
CENTRAL RAILROAD COMPANY.

ST. LOUIS-COULTERVILLE COAL COMPANY
v. SAME.

GROOM COAL COMPANY *v.* SAME.

33 I. C. C. 52 (1915).

R. W. Ropiequet and Winkelman & Ogle for complainants.
R. V. Fletcher for defendant.

REPORT OF THE COMMISSION.

MEYER, *Commissioner*:

Three complaints are under consideration in this case, identical both as to their averments and as to the character of proof offered. The complainants operate coal mines at Belleville and Coulterville, Ill., on the line of defendant's railroad. They allege that during certain periods of 1911, 1912, and 1913, defendant failed upon request to furnish a reasonably adequate supply of cars for the shipment of coal from their mines. We are asked to award reparation equal to the loss of profits on interstate shipments of coal which would have been made had the car supply been reasonable, plus the greater cost of mining due to restricted output. The complaints as originally drawn included a prayer for damages on account of the alleged failure of defendant to distribute its available equipment upon a nondiscriminatory basis, but upon the argument the issues were narrowed to a consideration of the reasonableness of the car supply during the periods in question.

The first question which presents itself is one of jurisdiction. In its answer and upon the hearing and argument defendant contends that we are without jurisdiction to award damages on account of any alleged failure on its part to furnish equipment.

It is urged that this is a question for the determination of the courts.

Section 1 of the act to regulate commerce, as amended June 29, 1906, provides, in part, that —

“ . . . the term ‘transportation’ shall include cars . . . and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor. . . .”

Section 8 of the act provides —

“That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney’s fee, to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected as part of the costs in the case.”

Section 9 of the act provides, in part —

“That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.”

Section 13 of the act gives the Commission jurisdiction upon complaint of anything done or omitted to be done in contravention of the provisions of the act by any common carrier subject to its provisions and, in the event of a failure of the carrier to satisfy the complaint, provides for investigation by the Commission. In the case of an investigation it is by section 14 of the act made the duty of the Commission to state its conclusions in writing, together with its decision, order, or requirement in the premises, and, in case damages are awarded, the finding of fact on which the award is made.

Although it is recognized by defendant that the provisions of section 1 of the act above referred to specifically impose upon

carriers the duty to furnish cars for interstate traffic upon reasonable requests therefor, it is argued that it does not necessarily follow that this Commission has jurisdiction to award damages consequent upon a carrier's failure to perform this duty. Attention is called to several sections of the act regulating matters which it is asserted must obviously be committed to the courts. Thus, by section 20 it is made the duty of each railroad company to issue a bill of lading, and it is provided that the initial carrier shall be responsible for all damages even though they be caused by a connecting carrier. By section 23 jurisdiction is conferred upon the courts of the United States to entertain petitions for writs of mandamus to compel common carriers to move and transport traffic and to furnish cars. Other provisions of the act provide for criminal prosecution, and it is submitted that this Commission would not sit as a criminal court to decide whether the act has been violated and to impose punishment therefor. It is argued that these provisions of the act indicate that some things therein contained are for the Commission to decide, and other matters are left to the courts.

Based on the decision of the Supreme Court in *T. & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, defendant contends that if the Commission has jurisdiction in a case of this sort, the courts have not, and conversely, if the courts have jurisdiction the Commission has not. It claims that in this decision the Supreme Court has read out of section 9 of the act that provision which gives any person claiming to be injured by any common carrier subject to the provisions of the act the election either to bring his complaint before the Commission or to bring suit in a court of competent jurisdiction. Consequently, it is argued that when the complainant in this case asks for an order of reparation at the hands of the Commission it is a denial of the jurisdiction of the court. In further support of this position defendant calls attention to *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481; *P. R. R. Co. v. International Coal Mining Co.*, 230 U. S., 184; *Morrisdale Coal Co. v. P. R. R. Co.*, 230 U. S., 304; *S. Ry. Co. v. Reid*, 222 U. S., 424; and *Mitchell Coal Co. v. P. R. R. Co.*, 230 U. S., 247. These cases will be discussed in detail later on. Defendant argues that suits for damages on account of failure to furnish cars are among the matters mentioned in the act to regulate commerce with which the Commission is not called upon directly to deal, and jurisdiction in regard to which is obviously conferred upon the courts.

It is further contended that, under the seventh amendment to the federal constitution the question here under consideration requires a jury trial, of which defendant will be deprived should the Commission assume jurisdiction.

It is urged that the Commission has not heretofore entertained the view that it has jurisdiction in controversies of this character. Defendant calls attention to the following conference rulings and decisions wherein we have refused to take jurisdiction in situations which defendant alleges are analogous to the one presented in the present case: *Conference Rulings Nos. 127, 296, 317, and 384*; *Council v. W. & A. R. R. Co.*, 1 I. C. C.; 339; *New Orleans Cotton Exchange v. I. C. R. R. Co.*, 3 I. C. C., 534; *Loud v. S. C. R. R. Co.*, 5 I. C. C., 529; *Duncan v. A., T. & S. F. R. R. Co.*, 6 I. C. C., 85; *Jones v. St. L. & S. F. R. R. Co.*, 12 I. C. C., 144; *Blume & Co. v. Wells Fargo & Co.*, 15 I. C. C., 53; *Royal Brewing Co. v. Adams Express Co.*, 15 I. C. C., 255; *Joynes v. P. R. R. Co.*, 17 I. C. C., 361; *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356; *Ponchatoula Farmers Asso. v. I. C. R. R. Co.*, 19 I. C. C., 513; *Buffalo Hardwood Lumber Co. v. B. & O. S. W. R. R. Co.*, 21 I. C. C., 536; and *Richmond-Eureka Mining Co. v. E. N. Ry. Co.*, 29 I. C. C., 62.

Attention is also called to the decision of the United States circuit court for the western district of Missouri in *Danciger v. Wells Fargo & Co.*, 154 Fed., 379, and to the decision of the Supreme Court of the United States in *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S., 70, as holding, according to defendant's interpretation of these opinions, that the Commission has no jurisdiction to award damages in case shipments have been refused by a carrier. It is argued that there can be no distinction in principle between the refusal on the part of a carrier to accept shipments and the failure on the part of the same carrier to furnish needed equipment. These cases will also be given consideration later on. Defendant states that numerous cases of the failure of carriers to furnish cars have been entertained by the courts, and that the causes have proceeded to judgment without any point having been made as to the necessity of prerequisite action by the Commission. If such action by the Commission be necessary, it is alleged that a large number of cases now before the courts are not properly there.

Reverting again to section 23 of the act and its bearing upon the present case, the question is asked how the theory that the determination of the legal sufficiency of the car supply must be

primarily submitted to the Commission can be reconciled with the provisions of section 23, which commit to the courts the right to issue writs of mandamus to compel carriers to move traffic and furnish cars. It is argued that whether the suit be for mandamus under section 23 or whether it be for damages, as in the instant case, the question in both cases must be to find out whether the car supply was legally sufficient.

A further contention made by defendant is that as a matter of expediency this Commission should not take jurisdiction of such matters as those herein involved. Defendant fears that if complaints of this character are recognized by the Commission it will be seriously handicapped by lack of time to devote to important questions clearly committed to it by the provisions of the act. . . .¹

A careful examination of the language used by the Supreme Court shows that it has nowhere declared that there can be no concurrent jurisdiction of the Commission and the courts. True, it has stated that section 9 must be read in the light of the remainder of the act and can not be so interpreted as to defeat the purposes of the act. For that reason it was held that certain questions may not be brought before the courts for adjudication without a prior determination by this Commission. The fallacy of defendant's reasoning becomes evident when we consider the reasons assigned by the court for not assuming original jurisdiction of administrative questions. In the *Abilene* case the court said that an interpretation of the act which would allow a shipper to obtain relief upon the basis that the established rate was unreasonable in the opinion of a court and jury would "destroy the prohibition against preference and discrimination"; and would make it impossible to maintain "a uniform standard of rates." In other words, an opposite holding would have accomplished the very thing which the act to regulate commerce was intended to prevent. Can it be argued that if the Commission assumed jurisdiction in the present case the accomplishment of the objects and purposes of the act would be endangered? It is obvious that such a contention can not be made. In the *Mitchell* case it is definitely stated that "section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute." The only

¹ The Commission here considered the authorities beginning with the *Abilene* case, 204 U. S. 426, p. 502 *et. seq.*, *supra*. — Ed.

exception made in any instance is that necessitated by the prior adjudication by the Commission of an administrative question.

Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in *P. R. R. Co. v. International Coal Co.*, *supra* [230 U. S. 184]. It may be that after the determination by the Commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the Commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that *upon reasonable request* it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the *Mitchell case*, "involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of" this tribunal.

It does not necessarily follow, however, that every case involving car supply must come first before this Commission. It is obvious that if a carrier should absolutely refuse to furnish a shipper cars under any circumstances that would be a violation requiring no administrative determination, and the courts could take primary jurisdiction. It would be analogous to the situation presented in *P. R. R. Co. v. International Coal Co.*, *supra*, or *Danciger v. Wells Fargo & Co.*, *supra*, and *L. & N. R. R. Co. v. Cook Brg. Co.*, *supra*, to which defendant referred in its argument. In the latter case it was held to be unnecessary under the rule in the *Abilene case* for a shipper, who had been refused transportation of liquor into dry territory because of the alleged pro-

hibition of a state statute, to go to the Commission before suing for a mandatory injunction to compel such service.

A large number of the cases now before the courts involving the adequacy of carriers' car supply, and which defendant contends must be held to be improperly before the courts should the Commission have jurisdiction in the present case, are undoubtedly cases of the sort referred to in the preceding paragraph. So, also, cases involving the adequacy of car supply for intrastate shipments are obviously within the jurisdiction of state tribunals.

The distinction between a case involving car supply of which this Commission has primary jurisdiction and a case which may be brought before the courts without a prior determination by the Commission is clearly stated in *United States v. L. & N. R. R. Co.*, 195 Fed., 88. In that case the United States Commerce Court was petitioned for a writ of mandamus commanding defendants to transport coal over the through routes and at the joint rates which had been established by them. It appears that there had been a controversy of long standing between defendants as to which carrier should furnish cars for loading at the mines of the petitioners. The court held:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

Another decision of the Supreme Court of the United States which involves a question of car supply is *C., R. I. & P. Ry. Co. v. Hardwick Elevator Co.*, 226 U. S., 426. In that case the court had under consideration the validity of a Minnesota statute which, among other things, undertook to penalize carriers in the sum of one dollar per car per day for failing to supply cars upon demand. The Supreme Court held that Congress had legislated upon the subject of furnishing cars and that state regulations, in

so far as they applied to interstate shipments, must yield to the supreme power conferred upon Congress by the commerce clause of the federal constitution. Upon pages 434 and 435 of the opinion, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request therefor, the court said:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by section 8, is it provided 'That in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.' Further, by section 9, an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by section 10 it is made a criminal offense for an employee of a corporation carrier to "willfully omit or fail to do any act, matter or thing in this act required to be done.'"

Although the question was not directly involved, it should be noted that the court states definitely that upon a carrier's failure to furnish cars for interstate traffic upon reasonable request therefor, an election is given, under section 9 of the act, either to make complaint to the Interstate Commerce Commission or to bring in a designated court an action for the recovery of damages.

Defendant has also called attention to certain rulings of this Commission in situations alleged to be analogous to the present one, which, it is alleged, are inconsistent with the assumption of jurisdiction in the present case. Some of these rulings, such as the refusal of the Commission to take jurisdiction to award damages for failure to deliver telegrams or for delay in shipments, clearly involve duties imposed on the carriers by the common law, which are not referred to in the act to regulate commerce.

In *Huerfano Coal Co. v. C. & S. E. R. R. Co.*, 28 I. C. C., 502, 506, the Commission used the following language:

"It is the view of the Commission that each carrier subject to the act is charged with the duty of furnishing cars to the industries located upon its line. In the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein. The law of this case, therefore, is that the Colorado & Southeastern Railroad, so long as it is to be considered as a common carrier, has the duty of furnishing cars for shipments between points on its line if there are any such shipments. Its obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections, and it can not be relieved of its portion of such joint liability by any contract with such connections."

Defendant's argument that the assumption of jurisdiction in the present case would be inconsistent with the mandamus provisions of section 23 of the act is completely answered in *B. & O. R. R. Co. v. Pitcairn Coal Co.*, *supra*, where the court said that the remedy afforded by section 23 —

"must be limited either to the performance of those duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission, rendered within the lawful scope of its authority, until such orders are set aside by the Commission or enjoined by the courts."

There remains for consideration defendant's objection to the assumption of jurisdiction by the Commission in the present case on the ground that it would violate the provisions of the seventh amendment to the constitution, which guarantees a trial by jury in all controversies triable at common law and involving more than \$20. Under the original act of 1887 the Commission had no power to award damages, since that act provided no method for allowing the defendant the jury trial to which it was entitled under the seventh amendment. The amendment of March 2, 1889, to section 16 provided for a jury trial before the federal courts at the request of the defendant in all cases wherein the Commission awarded damages, thus removing the constitutional objection to an award of damages by the Commission. Further changes were made in section 16 of the act by the amendments of June 29, 1906, and June 18, 1910, eliminating much of the language added in 1889. In the act as it now stands it is provided that

suits to enforce the Commission's orders for reparation "shall proceed in all respects like other civil suits for damages." In this connection we call attention to the following from *Mitchell Coal & Coke Co. v. P. R. R. Co.*, 230 U. S., 247, 258, where the court said with regard to orders of reparation by this Commission:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi judicial and only prima facie correct in so far as they determine the fact and amount of damage — as to which, since it involves the payment of money and taking of property, the carrier is by section 16 of the act given its day in court and the right to a judicial hearing."

From this it becomes evident that defendant would not be deprived of its rights under the seventh amendment should this Commission assume jurisdiction in the present case.

Even if it were true that the Commission and the courts have concurrent jurisdiction of this case, considerations of expediency should have no weight in deciding whether or not the Commission should assume jurisdiction. The question of expediency was decided by Congress and is a matter reserved for the consideration of the legislative branch of the government, into which we can not inquire. This Commission must look to the act and the amendments thereto for guidance, and we are satisfied that under its provisions as interpreted by the Supreme Court of the United States, it is our duty to determine the issues herein presented. . . .

CLARK, *Commissioner*, dissenting:

The Commission is vested with broad powers and wide discretion. In part its duties are quasi judicial, but it is primarily and essentially an administrative body, exercising powers which are legislative in their nature and which are delegated to it by the Congress and are limited by the terms of the delegation. It is clearly our duty to observe and enforce the substantive and definite provisions of the act, with due consideration for the letter and the spirit of the law. The operation of the railroads is inseparably bound up with the commerce of the country. The demands upon the railroads are varied in their nature, and they vary greatly with changing conditions. It is therefore necessary, while observing the letter and the spirit of the law, to construe and administer

it in workable ways and so that commerce and transportation will be promoted and not retarded.

In so far as federal legislation and regulation go, the carriers have so far been left to exercise their own judgment in the construction of roads and the equipment thereof. The roads are built and operated by private owners and for financial profit. It is therefore presumed that a carrier will, in so far as it is able to do so, provide itself with such facilities as will on the whole permit it to serve its patrons and earn the largest possible revenue, with proper consideration for judicious investment and proper economies.

The railroads are permitted to provide equipment by purchase, lease, or rental. In *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S., 452; it was held that a railroad's car supply may be legally sufficient, and yet not sufficient to meet the demands of shippers in unforeseen contingencies, fluctuations in the demand for transportation, or unavoidable absence of equipment off the line.

As was stated in *Investigation of Alleged Irregularities in Mine Ratings by the I. C. R. R. Co.*, 25 I. C. C., 286, 293:

"If the carriers were to equip themselves with cars, motive power, tracks, and terminals so as to meet at any moment the maximum demand for transportation, the shipping public would be obliged to pay interest upon that investment, and for the maintenance of those facilities."

The demand for cars varies in different parts of the year and as between different years, dependent upon general conditions of business, more or less bountiful crops, and climatic conditions. In a moderate winter we hear no complaints of shortage of cars for the transportation of coal, while in a severe winter such complaints are heard from all coal-producing sections. When there is a heavy crop of grain and a good market therefor there is a correspondingly heavy demand for cars for movement of grain, but under different conditions as to crop and market the demand for cars is correspondingly different. The same is true of the cotton crop. In 1907, a time of tremendous business activity, there was a general shortage of cars and terminal facilities, but that condition did not last, and since then there has been, as the reports show, a general surplus of idle cars.

The Commission has never exercised, and has never been understood to possess, the power to require a carrier to enlarge its facilities or service or to award damages against a carrier for

failure so to do. Certain properties, such as tracks, bridges, ferries, etc., are specified in the act as included in the term "railroad," but the act contains no suggestion that the Commission is empowered to require a carrier to provide additional tracks, bridges, or ferries. The act declares it to be the duty of every carrier subject to its provisions to provide and furnish transportation upon reasonable request therefor, and defines the term "transportation" as including "all instrumentalities and facilities of shipment or carriage," including cars and other vehicles and all services in connection with the receipt, delivery, elevation, storage, etc., of property transported. If, therefore, the Commission has power to require a carrier to provide itself with additional cars, or suffer awards of damages for failure so to do, it would follow that the Commission has the same power to require a carrier to provide itself with an elevator, warehouse, or additional tracks, or to run additional trains, or be subject to awards of damages for failure so to do.

The prime purposes of the law are to insure the public against unreasonable charges and secure service for the public that is free from unjust discrimination and undue prejudice. The railroad, including the parts thereof which are enumerated as embraced in the term "railroad," and the facilities specified as included in the term "transportation," is subject to the provisions of the act. This sets at rest all question as to whether or not those parts and facilities are subject to the regulatory power, and removes all doubt as to the right to use them, or any of them, in such way as to create or continue unjust discrimination or undue prejudice. All railroads existing and engaged in interstate transportation at the time the law became effective, and all subsequently constructed railroads similarly engaged, were brought within the terms and provisions of the act, but no obligation was laid upon any such railroad to extend its lines or enlarge the field of transportation in which it was engaged.

The act requires a carrier subject to its provisions, upon proper application, to construct, maintain, and operate on reasonable terms switch connections with lateral branch lines of railroad or private sidetracks, and to "furnish cars for the movement of such traffic to the best of its ability." This language seems to recognize the fact that the carrier may not, and probably will not, be able at all times to furnish desired cars, but it must furnish them "to the best of its ability" and without discrimination between shippers.

Section 7 of the act prohibits carriers from preventing the carriage of freight from being continuous from the place of shipment to the place of destination by carriage in different cars, break of bulk, stoppage, or interruption, which is not made in good faith for some necessary purpose.

Section 8 of the act provides that if a carrier shall do anything prohibited, or omit to do anything required of it, by the act, it shall be liable to the person injured for damages sustained in consequence thereof, together with reasonable counsel or attorney's fee, "to be fixed by the court in every case of recovery."

In section 20 of the act it is provided that the courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States, at the request of the Commission alleging a failure to comply with, or violation of, any of the provisions of the act, to issue writs of mandamus commanding such carriers to comply with any provision of the act.

Section 23 of the act specifically confers upon the federal courts jurisdiction, upon the relation of any person, firm, or corporation alleging such violation by a carrier of any provision of the act as prevents the relator from having interstate traffic moved at the same rates charged, or on as favorable conditions as those given to, any other shipper, to issue a mandamus commanding a carrier "to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ." Such mandamus may issue notwithstanding any question of fact as to proper compensation to the carrier is undetermined, upon such terms as to security for payment as to the court may seem proper.

Under the well-known conditions of transportation by railroad, and responsive to the plain intent of the law as expressed by the prohibition hereinbefore referred to against interruption to through shipments, and the requirement that carriers shall establish and maintain through routes and joint rates, it is essential that cars shall be freely interchanged between carriers. The varying conditions in different sections of the country at different seasons of the year and in different years render it, I believe, impracticable and impossible for the carrier which receives from a connection a loaded car to always deliver in return therefor an empty car. . In addition to this there are multitudes of instances in which, and many times and seasons of the year when, such exchange of an empty for a load is neither desired nor desirable.

The empty car may not be needed there, but may be badly needed at some other point or by some other connecting road.

A carrier being required to be a party to through routes and joint rates and to facilitate the movement of shipments without carriage in different cars or breaking of bulk, it follows that it must permit its cars to go to such destinations as are selected by the shipper. It can have no accurate knowledge of what those destinations will be. The shipper will naturally select the market which is most advantageous to him. He may, therefore, ship in one direction at one time and in another direction at another time. If the carrier must respond in damages because of its inability to furnish cars at a time of unusual demand for cars, it seems to me that the right of that carrier to confine its equipment to its own rails must be recognized; but that right was specifically denied to the respondent in the instant case in *Missouri & Illinois Coal Co. v. I. C. R. R. Co.*, 22 I. C. C., 39.

In the original act, as well as in amendments thereto which have broadened, extended, and strengthened the Commission's jurisdiction and powers, the Congress has carefully refrained from transferring to, or conferring upon, the Commission any jurisdiction or power which properly belongs to the judicial branch of the government.

For all of these reasons, together with the fact that the Commission's orders for the payment of money are only prima facie evidence in the courts, in connection with which the court may receive additional testimony which has not been presented to the Commission, I think that the question of requiring a carrier to provide itself with additional facilities or respond in damages for failure so to do is essentially a judicial question jurisdiction of which reposes in the courts, which have authority to create and direct the conduct of receiverships, and not in the Commission, which has been created to exercise certain delegated powers legislative in character. I am, therefore, unable to agree with the majority report.

I am authorized by CHAIRMAN HARLAN and COMMISSIONER CLEMENTS to say that they concur in these views.

2. JUDICIAL REVIEW

INTERSTATE COMMERCE COMMISSION *v.* ILLINOIS
CENTRAL RAILROAD COMPANY.

215 U. S. 452 (1910).

MR. JUSTICE WHITE delivered the opinion of the court.¹

In consequence of one of the comprehensive amendments to the act to regulate commerce, adopted in 1906, § 15, Act June 29, 1906, c. 3591, 34 Stat. 584, 589, it is now provided that "all orders of the commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time not exceeding two years, as shall be prescribed in the order of the commission, unless the same shall be suspended or set aside by a court of competent jurisdiction." The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.

Beyond controversy, in determining whether an order of the commission shall be suspended or set aside, we must consider, *a*, all relevant questions of constitutional power or right; *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided,

¹ The facts and remainder of opinion will be found on pp. 172 and 412, *supra*.—ED.

it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order and not the mere expediency or wisdom of having made it, is the question.

ILLINOIS CENTRAL RAILROAD COMPANY, GULF AND
SHIP ISLAND RAILROAD COMPANY, SOUTHERN
RAILROAD COMPANY *v.* THE INTERSTATE COM-
MERCE COMMISSION.

206 U. S. 441 (1907).¹

This case involves the validity of an order of the Interstate Commerce Commission requiring the appellants "to cease and desist on or before the first day of April, 1905, from further maintaining or enforcing the unlawful advance of two cents per hundred pounds, or the said unlawful rates resulting therefrom, for the transportation of lumber from shipping points on defendants' respective lines in the State of Louisiana east of the Mississippi River and in the States of Mississippi and Alabama to Cincinnati, Louisville, Evansville, Cairo, and other points on the Ohio River commonly called and known as Ohio River Points."

The order was made in the matter of the complaint filed with the Commission by the Central Yellow Pine Association, an incorporated association composed of persons, firms and corporations engaged in the business of manufacturing yellow pine lumber in the States of Mississippi, Alabama, and that part of Louisiana east of the Mississippi River.

The complaint charged that the appellants were common carriers by rail, engaged in interstate commerce, and as such were engaged in the transportation of yellow pine lumber from the mills and lumber plants of the members of the Yellow Pine Lumber Association to the territory known as the "Central Freight Association Territory," which lies on the north of the Ohio River and on and between the Mississippi River on the west and a line running through Buffalo and Pittsburg on the east, and that the members of the association are dependent upon appellants

¹ The statement of facts has been abbreviated. — Ed.

for the transportation of their lumber to the markets of the country; that the appellants and the railways carrying yellow pine lumber to the same markets from the territory west of the Mississippi River, embracing the States of Texas, Arkansas, and that part of Louisiana west of the river, by agreement or concert of action advanced the rate on yellow pine lumber from the territories both east and west of the Mississippi River on and beyond the Ohio River in Central Freight Association Territory two cents per hundred pounds. The advance was made applicable south of the Ohio River and effective on and from April 15, 1903, except as to the Louisville and Nashville road, as to which it became effective June 22, 1903. And it was alleged that such advance was "unjust, unreasonable, as well as discriminative in violation of the Act to Regulate Commerce." The answer of the railways admitted the advance, but denied that it had the character and effect charged, but alleged that, on the contrary, it was reasonable and just and not in violation of law. The answers also specifically justified the advance by the conditions of the market and the traffic, including competition, and the costs of operating the roads. Testimony was taken on the issues thus formed.

The Commission sustained the complaint and made the order recited above. 10 I. C. C. R. 505. The railways refused to obey. The Commission then instituted this proceeding in the Circuit Court of the United States for the Eastern District of Louisiana, where further proof was taken and a decree rendered which affirmed the order of the Commission and made it the order of the court. The roads were also enjoined from further disobedience to the order. No opinion was filed.

Mr. Ed. Baxter for appellants.

Mr. L. A. Shaver, Mr. T. M. Miller and Mr. Marcellus Green, with whom *Mr. Garner Wynn Green* was on the brief, for appellee.

MR. JUSTICE McKENNA delivered the opinion of the court.

Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief:

"I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which

are fairly involved in the just determination of these cases, and to remand them to the Commission to be re-examined upon the testimony in conformity with the principles of transportation law to be announced by this court."

To what, then, shall we resort? How shall we determine what "principles of transportation law" were involved? How determine whether they were recognized and applied, or denied and rejected by the Commission, and, necessarily, by the Circuit Court? An examination of the testimony by concession of counsel is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & Nashville Railroad Co. v. Behlmer*, 175 U. S. 648; *East Tenn. &c. Railroad Co. v. Interstate Commerce Commission*, 181 U. S. 1, 27. And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the Circuit Court.

The question is one of the reasonableness of a rate, and such a question was said to be one of fact in *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197; *C. N. O. & T. P. Ry. v. Interstate Commerce Commission*, 162 U. S. 184. In these cases, however, it was declared that the conclusions of the Commission are subject to review if it excluded "facts and circumstances that ought to have been considered." Upon this declaration appellants rely, and justify their invocation that this court express and enforce the principles of transportation which, they contend, the Commission disregarded; and appellants venture the observation that unless this be done "there will be no settled principles of law for the guidance of either the Commission or of the courts," and that "the interstate railroad companies will be the only persons in this country who will not be able to obtain the opinion of the courts upon questions of law which vitally affect their interest." We think the apprehension is groundless and is demonstrated to be groundless by the cases cited. In all of them legal propositions were reviewed as elements in the inquiry of the reasonableness of a rate. Those cases, however, are in marked contrast to the pending case. It will be

observed that in them the instances were very simple. There was a salient circumstance in each of them about which there was no uncertainty. In other words, it was unconfused by dispute and was not put to question by a conflict of testimony. A definite legal proposition unmingled with fact was presented and the only act of judgment exercised by the Commission was to reject it.

In *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, passing on the effect of a shipment on a through bill of lading to give jurisdiction to the Commission (in which the Commission was sustained), the questions presented were the power in the Commission to fix a maximum rate, and whether competitive conditions could be considered by a railroad in fixing a greater charge for a shorter than a longer distance on its own line. It was decided that the power to pass on the reasonableness of an existing rate did not imply the power to prescribe a rate. On the conditions affecting competition, it was not found necessary to pass, but the following passage is worth the quoting as bearing on the contention of appellants:

"It has been forcibly argued that, in the present case, the Commission did not give due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged. But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the Circuit Court of Appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

In *Texas & Pacific Railway v. Interstate Commerce Commission* ocean competition as constituting a dissimilar condition and as justifying a difference in rates between import and domestic traffic was the circumstance considered. The Interstate Commerce Commission had ruled against such competition as a factor and condemned rates made in view of it to be undue and unjust. The court observed:

"But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts — that it was shut up by the terms of the act of Congress, to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada."

And further:

"We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters

involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

The ruling of the Commission was reversed.

In *Interstate Commerce Commission v. Alabama Midland Railway* 168 U. S. 144, there was passed upon a decision of the Commission that the competition of river lines of transportation was not a factor to be considered when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the Interstate Commerce Act. The decision was declared to be an erroneous construction of the act.

In *Louisville & Nashville Railroad Co. v. Behlmer* (passing by subordinate questions) the dominant element was the construction of the fourth section of the Interstate Commerce Act. The Commission and the Circuit Court of Appeals, it was said, "mistakenly considered as a matter of law that competition, however material, arising from carriers who were subject to the act to regulate commerce could not be taken into consideration, likewise that competition, however substantial, not originating at the initial point of the traffic, was equally as a matter of law excluded from view."

In all these cases, therefore, there was a single, distinct and dominant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, would be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power. Let us now see what the propositions are which appellants propose for our adoption. They are presented as presumptions of law, which dispense with evidence until rebutted or countervail evidence by their probative force. (1) That the rate published by a carrier is reasonably low. (2) A rate upon a commodity, made by the competition of carriers, is reasonably low, and the burden is on him who assails it. (3) A rate upon a commodity as low, or lower, than the majority of rates charged by other carriers for the transportation of the same grade of commodities for similar distances in the same or other territory, is reasonably low, and the burden is upon him who insists that it is unreasonably high. (4) A rate charged by a carrier which has the "strongest possible motive" to develop and increase a traffic in a particular commodity, and has maintained such rate for a "long series of years," so as to have induced a large and continuous increase of business

in that commodity and of the capital invested, is reasonably low. (5) Rates being so adjusted upon a commodity, so as to enable it to move with profit to the shipper, whatever the conditions of the market, reducing the rates as the market declines, only increasing them as the market improves, a particular increase is reasonable, if it be shown that the percentage of increase has been greater in the price of the commodity than in the rates on it. (6) Rates reduced to meet a market depression and kept in effect during the depression, and increased when the depression ceases which does not cause the increased rates to exceed the rates that were maintained by the carrier, prior to the depression, are reasonable. (7), (8) Increase in rates upon all commodities impartially to meet largely increased expenditures on account of an abnormal increase in the volume of traffic is reasonable, "provided the gross earnings of the carrier yield less than the normal proportion of net earnings." Or provided the percentage of increase has been greater in the operating expenses of the carrier than in the rates upon the commodity. (9), (10) Upon the supposition that certain improvements have been made necessary by "an abnormal increase of traffic," they should be taken into account in determining the reasonableness of an increase of rates upon a commodity, whether as a matter of bookkeeping the expenditures should be charged to capital account or to the operating expenses; and without regard to the fact whether such expenditures have been paid out of the carrier's earnings or have been provided for by the issuance of bonds. (11) A rate on a commodity is profitable if it exceeds the cost of its movement; and, yet, the rate may be unreasonably low, if it does not contribute its fair share to operating expenses, taxes and fixed charges.

If these propositions should be granted as axioms of transportation there is the difficulty, as we have already pointed out, of determining to what extent — that is, whether to prejudicial extent, if at all — they were disregarded by the Commission and by the Circuit Court. The Circuit Court affirmed the order of the Commission, and it is an instant assumption that the court considered all the elements in the testimony and inferences from it. And the propositions of appellant are inferences of mixed law and fact, hence disputable — may be overcome or counterpoised, and, therefore, the court in reaching its ultimate judgment may have given them all the weight to which they were entitled.

It is almost impossible to discuss the contentions of appellants without bringing forward the elemental. A presumption is the

expression of a process of reasoning, and most, if not all, the rules of indirect evidence may be expressed as such. We cannot go far in the investigation of any controversy without finding ourselves compelled to infer one fact from another, but we would not therefore be justified in declaring such inferences legal axioms. It is to this that appellants invite us and seek to erect disputable inferences from conduct that may have many explanations into intendments of law.

In this connection *Texas Pacific Railway v. Interstate Commerce Commission*, *supra*, is an instructive case. In that case, we have seen, it was decided that whether the rate was reasonable or unreasonable, was a question, whatever its theoretical nature, for the tribunal that decides upon matters of fact. Among other cases cited to sustain that position was *Denaby Main Colliery Company v. Manchester &c. Railway Company*, 3 Railway and Canal Traffic Cases, 426. In that case it was declared that reasonableness of a rate was a question of fact and not reviewable by an appellate court, unless circumstances which ought to have been considered were not considered, and that a decision must be arrived at fairly looking at all the circumstances that are proper to be looked at. The appellant in the case contended against the consideration by the railway commissioners of competition between two places, and the Court of Appeals, replying, said:

"If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, and that they are not circumstances legitimately to be considered, no doubt they establish that the court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the court has given too much weight to it or too little, becomes a question of fact and not of law. The point is undoubtedly a very important one."

And it may be well to say here as a suggestive principle throughout that, it was pointed out, such conclusions of fact were "to be arrived at, looking at the matter broadly and applying common sense to the facts that are proved." The remarks of Willes, J., in *Phipps v. London & North-Western Railway*, 2 Q. B. D. 1892, pp. 229, 236, when the case was before the Railway Commissioners, were in effect approved. This court also quoted them.

Willes, J., said, speaking of the questions of undue or unreasonable preference or advantage to or in favor of any particular person under section 2 of the Railway and Canal Traffic Acts, that they were eminently practical, "and if this court once attempts the hopeless task of dealing with questions of this kind with any approach to mathematical accuracy, and tries to introduce a precision which is unattainable in commercial and practical matters, it would do infinite mischief and no good."

It is conceded, as we have said, that the presumptions contended for by appellants are mixed of law and fact, except, may be, those which we shall presently consider. If either element is dominant in such presumptions, it must be that of fact. In other words, the fact must be ascertained before the law draws its inference. This is especially pertinent to the propositions urged by appellants. Let us illustrate. Take, for example, the second proposition that "a rate upon a commodity *made by competition* of carriers is reasonably low, and the burden is on him who assails it." But suppose competition is not established or is disproved, what becomes of the inference and the onus of proof dependent upon it? The question marks the condition that appellants encounter in the findings of the Commission. The findings of the Commission in effect negative the facts upon which the propositions depend. In still greater degree there is illustration in the first proposition. That proposition is an inference from an inference, as we shall presently point out. The reasonableness of the rate is inferred from competition, and competition is inferred from the publication of the rate.

This comment, it may be said, is not applicable to the ninth and tenth propositions of appellants, as they present propositions of law which were not only disregarded by the Commission, but the antithesis of them was asserted in the eighth finding. This contention must be specifically considered. The Commission finds that the net and gross earnings of the appellant have grown from year to year, and also that what they have reported as operating expenses have also grown. But in these operating expenses there were included "expenditures for real estate, right of way, tunnels, bridges, and other strictly permanent improvements, and also for equipment, such as locomotives and cars." The Commission expressed the opinion that such expenditures should not be charged to a single year, but "should be, so far as practicable and so far as rates exacted from the public are concerned, 'projected proportionately over the future.'" And it

was said: "If these large amounts are deducted from the annual operating expenses reported by the defendants (appellants), it will be found that the percentage of operating expenses to earnings has in some extent diminished and in others increased to no material extent." The exact effect of the difference of view between appellants and the Commission as to operating expenses there is no test, but it cannot be said, even if the Commission was wrong as to such expenses, that error in its ultimate conclusion is demonstrated or that the correctness of the conclusion is made so doubtful as to justify a reversal. The findings show that the old rates were profitable and that dividends were declared even when permanent improvements and equipment were charged to operating expenses. But may they be so charged? Appellants contend that the answer should be so obviously in the affirmative that it should be made an axiom in transportation. On principle it would seem as if the answer should be otherwise. It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. But it is insisted that *Union Pacific Railway Co. v. United States*, 99 U. S. 402, establishes the contrary. That case was not concerned with rates of transportation or the rule which should determine them against shippers. It was concerned with the construction of the words "net earnings" in an act of Congress, five per cent of which earnings were provided to be applied annually to a loan by the Government to the railroad. Considering the provision of the act and its purpose, it was concluded "that the true interest of the Government" was "the same as that of stockholders, and would be subserved by encouraging a liberal application of the earnings to the improvement of the works." "It is better," it was said, "for the ultimate security of the Government in reference to the payment of its loan, as well as for the service which it may require in the transportation of its property and mails, that a hundred dollars should be spent in improving the works, than that it should receive five dollars towards the payment of its subsidy. If the five per cent of net earnings, demandable from the company, amounted to a new indebtedness, not due before, like a rent accruing upon a lease, a more rigid rule might be insisted on. But it is not so; the amount of the indebtedness is fixed and unchangeable. The

amount of the five per cent and its receipt at one time or another is simply a question of earlier or later payment of a debt already fixed in amount. If the employment of any earnings of the road in making improvements lessens the amount of net earnings, the Government loses nothing thereby. The only result is, that a less amount is presently paid on its debt, while the general security for the whole debt is largely increased." The interest of the Government in the improvement of the road was even greater than that of a stockholder. This was manifest from its munificent gift of lands, in addition to its generous loan of credit. As benefactor of the road and as creditor of it, as a Government concerned with the development of the country, as a money lender concerned with the extent of security, "the true interest" of the United States might be that revenue should be applied to improvements. Payment of the debt was only postponed, not denied, and this and the other considerations, might well determine the construction of words in the statute which were capable of different meanings. But such is not the relation or concern of a shipper of lumber. His right is immediate. He may demand a service. He must pay a toll, but a toll measured by the reasonable value of the service. The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think, it is clear, that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape.

The first proposition submitted by appellants may also be said to be so far absolute and independent of evidence as to be considered as a presumption of law simply. This is contended on the authority of *Van Paten v. Chicago, Milwaukee & St. Paul Railway Co.*, 81 Fed. Rep. 545. It is difficult to analyze the case briefly. It was an action of damages against the railroad for charging unjust and unreasonable rates under the assumption that sections 8 and 9 of the Interstate Commerce Act gave such an action, though the railroad had charged according to the schedule of rates filed with the Interstate Commerce Commission. The answer of the railroad set up the schedule and that rates had been charged shippers in accordance with it. The court overruled a demurrer to the answer and adjudged the defense good. The court discussed the question in an elaborate opinion, and, led by the difficulties of applying all of the provisions of the act, which were enacted, the court observed, to correct "the mode in which

carriers imposed their charges," sought in the act itself a standard of reasonableness.

The court, in its opinion, referred to the evils which had existed — rebates from published schedules, preferences and discriminations against shippers — and the purpose and hope of the act to correct them through the requirement of an imperative statutory standard, and by that, and other requirements, to establish free competition between railroads and, as a result of competition, reasonable rates. But it was not said or intended to be said that competition followed as a presumption of law in any given case. The court did not intend to assert a rule deduced from the conduct of railroads — conduct so far constant that the law would base a presumption upon it and forever fix it as one of its intendments. Indeed the court meant to do no more than to deny a right of action for unreasonableness in the rates as filed. And this court, in *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, has decided that the redress of a shipper for such unreasonableness must be through the Interstate Commerce Commission. It is certain that a presumption that was sufficient to defeat an action in the Circuit Court could not be urged to defeat an inquiry by the Commission. Of course, if a complaint should be filed before the Commission and no proof adduced to support it, we cannot doubt but that the complaint would be dismissed; but this because of the principle that the party who asserts the affirmative in any controversy ought to prove the assertion, and that he who denies may rest on his denial until, at least, the probable truth of the matter asserted has been established. "The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge, nor probalitized by experience, the mind suspends its assent until proof of them is adduced." Best on Presumptions, sec. 32.

There are other contentions of appellants which we think are untenable. One only needs comment. It is said that it was error to hold the advance unreasonable and unjust because the charges made on lumber to Cairo and other points on the Ohio River "are mere divisions of through rates, the justness of which neither the Interstate Commerce Commission nor the Circuit Court has any jurisdiction to determine." Indeed, it is said, to do so is an exercise of a legislative function. We think the contention is in effect answered by *Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S. 184. If the contention is intended to be as extensive as its words

seemingly make it, it would withdraw from the supervision of the Interstate Commerce Commission and from the courts every shipment over two or more railroads. There necessarily must be some apportionment of the rates between such roads, and whether the advance should be made in the rates over one road or the other, or in the rates over all, can make no difference. In other words, it is competent for the Commission or the courts to consider the through rate, however composed. It must not be overlooked that the Commission and the Circuit Court found that the advance in the case at bar was made by agreement between the roads, and was not the individual action of each, induced by competition. It is true the contrary fact is asserted. It is asserted, that such action was the result of competition, and, that the "legal value" to which competition was entitled was not given it. The argument to support the contention has not convinced us. The inquiry was essentially one of fact, and the attempt to make competition an inference of law and dominating against the findings of the Commission and their affirmance by the Circuit Court we have already rejected.

But little more discussion is necessary. The concession of counsel with which we have commenced this opinion is a frank recognition of the effect which this court has given to the decisions of the Interstate Commerce Commission on questions of fact. And we have said very recently: "The statute gives *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed." *Cincinnati, Hamilton & Dayton R. R. v. Interstate Commerce Commission*, *ante*, page 142.

It is true, appellants assert, that clear and unmistakable error has been committed, but upon ground untenable as we have seen. And the present case above all others calls for the application of the rule. The question submitted to the Commission, as we have said, with tiresome repetition perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether

the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact and not of law. It seems from the findings, report and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the Circuit Court and its judgment confirmed that of the Commission and approved its order.

Decree affirmed.

MR. JUSTICE MOODY took no part in the decision of this case.

MR. JUSTICE BREWER dissents.

INTERSTATE COMMERCE COMMISSION v. LOUIS-
VILLE AND NASHVILLE RAILROAD COMPANY.

227 U. S. 88 (1913).

MR. JUSTICE LAMAR delivered the opinion of the court.¹

It is necessary to examine the record with a view of determining whether there was substantial evidence to support the order.

5. The Louisville & Nashville Railroad ran from New Orleans to Mobile and to Pensacola. From both of these cities it also had lines extending to Montgomery. When the road from Mobile to New Orleans was completed about 1871 there was in operation a boat line carrying freight from the latter city to Mobile and Pensacola. In order to meet this water competition a low rail rate was compelled and was put in force by the rail carrier.

In 1887 the through rate from New Orleans to Montgomery was adjusted so as to conform to an award by Judge Cooley, under which, rates from certain Ohio River points to Montgomery were to be the same, irrespective of any difference in distance. Rates to Montgomery from Kentucky points on the Mississippi were to be two cents lower, and rates to Montgomery from Memphis, Vicksburg and New Orleans were to be two cents lower still. With the exception of a change made necessary by the

¹ The facts and remainder of opinion are printed on page 509, *supra*.
—ED.

construction of a short line from Memphis to Birmingham, the class rates in that territory were, as a rule, maintained in conformity with the Cooley award, though, from time to time, commodity rates were made to meet special conditions.

Changes in rates from New Orleans to Mobile, to Pensacola, and from those cities to Montgomery were made in 1907. The carrier insists that the situation at Pensacola was not the same as at Mobile. But the controlling principle is applicable to the rates at all the points involved. And in order to prevent a treble discussion of the three cases the rates from New Orleans to Mobile to Montgomery may be regarded as typical. The increase in Class rates varied from 1 to 13 cents per 100 pounds. The increase in Class 3 was greatest, and it will therefore be taken as affording the best concrete example of the situation before and after the change of 1907.

Under the Cooley award the Tariff on Class 3 had been fixed as follows:

New Orleans to Mobile (local)	25
Mobile to Montgomery (local)	30
Combination of locals	55

But while these locals aggregated only 55 cents, there was, at the same time, a through rate:

New Orleans to Montgomery	68
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The carrier's filed tariffs contained a provision that wherever the rates between two points, on its line, was greater than the sum of the locals between the same places the combination of the two locals should be collected. There was nothing to indicate that shipments from New Orleans to Montgomery were not entitled to this Combination rate; but it seems that the privilege was rarely, if ever, granted to New Orleans merchants who, in order to get the advantage of the low locals (25), were obliged to ship to Mobile, there unload, reload and rebill to Montgomery at the 30-cent rate. By this inconvenient method they could secure the 55-cent rate to Montgomery. Otherwise, they paid the rate of 68 cents on the same goods over the same line between the same points.

The carrier was notified that this practice was in violation of the Commission's ruling that, except in special cases, the through rate must not exceed the sum of the locals. An enforce-

ment of this rule would have compelled the carrier to reduce the through rate (68) to the sum of the locals (55), and so, in less proportion, as to all other class rates involved in this case.

The company, however, met the situation by increasing the local, instead of reducing the through rate. For example, the rate on Class 3 from New Orleans to Mobile was raised from 25 to 38, so that, when added to the 30-cent rate from Mobile to Montgomery the Combination 68 equalled the existing through rate of 68 cents from New Orleans to Montgomery. Similar action was taken as to all other rates between New Orleans and Mobile and New Orleans and Pensacola and thence to Montgomery.

At the hearing the facts thus recited were established. The reports of the carrier, showing its earnings and expenses in detail, were in evidence. Its tariffs and those of other railroads were offered, as a basis for comparing the rates under attack with those charged by this and other companies for similar and longer distances. Numerous merchants from New Orleans testified that since the increase of August 13, 1907, they had been unable to sell in Mobile and Pensacola and that the through rate to Montgomery made it impossible to deal in that city. In its report the Commission found that the rates to Mobile, Pensacola and Montgomery from other and more distant points were actually or relatively higher than those for the shorter distance from New Orleans. That the ton-mile rate on the average of the first six classes was greater from New Orleans to Montgomery than from Memphis; that many departures had been made from the Cooley award; that the company's tariff contained a provision that the through rates should not exceed the sum of the locals; that while increasing the local on eastbound freight from New Orleans to Mobile and Pensacola no corresponding increase had been made on the westbound freight from those points to New Orleans; that the old low local out of New Orleans had been so long in force as to create a presumption that it was reasonable and compensatory. It concluded by entering an order adjudging that the rates in the tariff filed August 13, 1907, were unreasonable and directing the carrier to restore the old class rates (local) from New Orleans to Mobile and to Pensacola and to make a corresponding reduction in the through rates from New Orleans to Montgomery, Selma and Prattville.

This order was attacked generally and specially by a bill, which, at length and in minute detail, assailed each specific fact stated in the report on the ground, either that the fact found was without

evidence to support it, or that it was irrelevant to the issue involved and furnished no basis whatever for the order which followed.

The Commerce Court rendered a lengthy and elaborate opinion in which it reviewed all of the matters referred to in the Commission's Report and held that the findings were irrelevant, or without evidence to support them, or contrary to the uncontradicted testimony; that the fact that rates from more distant points to Montgomery, Pensacola and Mobile were actually or relatively lower than from New Orleans to the same points, furnished no basis for the order, unless it was shown that the conditions were similar while it affirmatively appeared that these lower rates were compelled by water competition; that no conclusion could be drawn from the fact that such rates to Montgomery from other points were lower on the ton-mile basis, in view of the universal rule that the longer the haul the lower the rate. That the departures from the Cooley award related only to commodity rates, which were not involved in this hearing, and that the complaints of the merchants as to inability to sell in Mobile, Pensacola and Montgomery were referable only to Commodity rates and not to Class rates. It found that no legal inference could be drawn from the fact that the low locals had been maintained on westbound shipments after the carrier, on August 13, 1907, raised the locals on eastbound shipments from New Orleans to Mobile and Pensacola, inasmuch as there is no legal objection to having lower rates in one direction than in another. It found that the sole ground for making the order was the fact that the carrier had raised rates after they had been in force for more than twenty years; although the presumption of reasonableness disappeared in view of the uncontradicted testimony that the old rates had been compelled by water competition.

6. It is unnecessary in this case to review each of the matters discussed, ruled and found by the Commission in its Report and only the more salient facts will be mentioned. For the validity of the order does not necessarily depend upon the correctness of each of these findings, so that the breaking of one or many links by disproof would destroy the chain upon which the order depended. These findings are collateral and if correct might be confirmatory of the ruling, which, however, might still be sustained if some of these statements were eliminated. The question is whether there was substantial evidence to support the order.

7. The pleadings charged that the new rates were unjust in themselves and by comparison with others. This was denied

by the carrier. The Commission considered evidence and made findings relating to rates which the carrier insists had been compelled by competition, and were not a proper standard by which to measure those here involved. The value of such evidence necessarily varies according to circumstances, but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies and history of rate-making in each section of the country. So, too, the fact that a Commodity rate is low may cast some light on the reasonableness of the higher rate on the Class, from which that Commodity was taken or to which it might legally be restored.

It is true that the old low locals, Mobile (west) to New Orleans were maintained, while those from New Orleans (east) to Mobile were raised is not conclusive against the reasonableness of new tariff put in force in 1907. But it was a fact tending to support the conclusion unless the difference was shown to have been warranted by proper rate-making rules. Of the sufficiency of the explanation, including the extent of the difference in empty car movement, the Commission was authorized to judge. It also had before it the company's financial statement and general tariff sheets. Against which was the testimony for the carrier, tending to prove that the rate to New Orleans was low in fact, and by comparison with those in force over other parts of the carrier's system, and on other lines in the same territory, even though this particular part of the road ran through a sparsely settled country, with expensive trestles and bridges, frequently damaged by storms from the Gulf and expensive to maintain.

8. But these facts did not stand alone. It appeared that for many years prior to 1907 the carrier had maintained low locals from New Orleans to Mobile and Pensacola. When first put in force they were abnormally low because compelled by water competition, and therefore furnish no just standard of reasonableness. And if when that competition disappeared the rates had been advanced, no inference adverse to the railroad could have been drawn from the increase. *Int. Com. Comm. v. Chicago G. W. Ry.*, 209 U. S. 108. The answer of the Railroad Company admits that this water competition had ceased to exist. The date is not definitely stated, but it is fairly inferable that the water competition was not potential for some years before the increase in rates in 1907. When made, the increase was not because of the absence of water competition, but to make the sum of the locals correspond with the through rates. Under the cir-

cumstances the maintenance of these low rates, after the water competition disappeared, tends to support the theory that by an increase of business or other cause they had become reasonable and compensatory.

9. From the appellee's standpoint, probably a principal objection to the order complained of, is that it will upset the Cooley award, under which rates have been adjusted throughout a large section. But that, too, was a matter for consideration by the Commission which by this order has not lost power to restore the old rates, or to make changes in the new if it shall be found that those put in force, unjustly discriminate in favor of New Orleans against other cities.

The order of the Commission, restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict nor put their judgment against that of the rate-making body, and the decree is

Reversed.

FLORIDA EAST COAST RAILWAY COMPANY v. UNITED STATES.

234 U. S. 167 (1914).

The facts are stated in the opinion.

Mr. Frederick C. Bryan and *Mr. Alex. St. Clair-Abrams* for appellant.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Bullitt* was on the brief, for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. Frederick M. Hudson for the Railroad Commissioners of Florida.

Mr. A. A. Boggs filed a brief for the Florida Fruit and Vegetable Shippers' Protective Association and the East Coast Fruit and Vegetable Growers' Association, intervening appellees.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The order of the Interstate Commerce Commission concerning which the appellant, hereafter called the East Coast Line, complained before the court below and which that court refused to enjoin was made on a second supplemental petition presented in controversies which had been long pending and twice before decided, such controversies involving many railroads and being concerned with the rates as to pineapples, citrus fruits and vegetables from places of production in Florida to exterior points of distribution or consumption. While the report here under consideration made on the second supplemental petition deals with only a few of the railroads concerned in the previous inquiries and with only a part of the controversies involved in the previous cases, yet the reports in the previous cases and the reasons stated by the Commission for its action in those cases are so connected with its action complained of in this case that it is impossible to understand this controversy without recurring to and stating the previous reports of the Commission in the controversies to which we have referred.

We observe before coming to make that statement that none of the testimony taken before the Commission in the cases prior to this one is in the record, it having been stipulated that the facts stated by the Commission in its reports in such previous cases should be taken as the facts of such controversies. For the purpose of the statement which we shall make the record therefore consists of the reports in such previous cases, of the report in this case and the testimony taken in this case before the Commission and in the court below. The future application of the facts which we shall state will be facilitated by giving a description of the East Coast Line as stated in the several reports of the Commission to which we shall immediately recur.

The East Coast Line is wholly within the State of Florida, the main line extending from Jacksonville south along the Atlantic coast to Miami, a distance of 366 miles, then to Homestead, 28 miles south, and thence across the Florida Keys to Key West. At the time of the final hearing before the Commission on March 2, 1911, the road was not fully constructed and was only completed and being operated to Knight's Key, about 83 miles below Homestead. The total mileage of the road was about 583 miles, including 477 miles of main line from Jacksonville to Knight's Key and about 106 miles of branch line above Miami. The cost of the construction from Homestead on was enormous, amounting to nearly \$175,000 per mile, and the total cost of the extension

from Homestead to Knight's Key, 83 miles, nearly equalled the entire cost of the balance of the road, 500 miles. On July 3, 1907, a petition was filed by the Florida Fruit & Vegetable Shippers' Protective Association against the Atlantic Coast Line, the Seaboard Air Line and Southern Railway Companies and the East Coast Line complaining of and asking a reduction in interstate rates on pineapples, citrus fruits and vegetables. The East Coast Line was the only one of the defendant railroads whose traffic was confined to the producing regions in Florida because while the other lines also undoubtedly penetrated to the area of production, their lines were not confined to Florida but were trunk lines carrying not only the product committed to them by producers in Florida, but also the products committed by producers to roads like the East Coast Line which did not extend beyond Florida and had therefore to be transshipped if destined to points beyond the State by other roads. In coming to make its report in the case thus referred to, the Commission thus stated the general situation of the railroad traffic of all the roads in Florida concerning the subjects under discussion (No. 1168, 14 I. C. C. 483):

"The shape and location of the state of Florida is such that these railroads which handle this traffic from the point of production up to the base point necessarily do but a limited business. They extend south considerable distances through a sparsely settled country which neither originates nor consumes a considerable amount of traffic. Some of them reach the seacoast, but none of them connect or can connect with railroads leading beyond, and the amount of through business handled is extremely light. Their traffic is confined almost entirely to bringing out the products which originate upon their lines, and carrying in the supplies which are consumed in the territory served by them. Fruits and vegetables, lumber, naval stores, and in some cases cotton and phosphate rock are the principal commodities carried, and of these, fruits and vegetables produce the most revenue."

In the report by which the Commission disposed of this controversy (No. 1168, 14 I. C. C. 476) it divided the rates to be considered into two classes: (a) gathering charges from production points in Florida to base points of which Jacksonville was the only one on the East Coast Line, and (b) rates from base points to points of final destination in other States, the sum of the two rates being the joint through rate.

Considering the three products whose traffic charges were under consideration, the Commission said:

(a) Citrus fruits:

"From an examination of the elaborate figures which were introduced upon the trial showing the character of the traffic handled by these Florida roads, the conditions under which it is handled, their earnings, and the cost of operation running through a series of years, it is difficult to see how these railroads can be expected to transport in a suitable way this fruit and vegetable traffic from points of production to these basing points for a less sum than they now receive. It is difficult to see how, even upon the present traffic, those lines can in the immediate future expect to pay any considerable return upon their investment. We feel that these local rates, although they are high in comparison with other local rates, are as low as should be established under all the circumstances." (p. 484.)

(b) Vegetables:

"The same observations which have been made upon the orange rates to base points apply with equal pertinency to those upon vegetables. They are named by the railroad commission of Florida. They are made with the understanding that they are really parts of through rates from the point of production to the market of consumption. They are low in comparison with other rates because it is understood that this industry is an important one to the State of Florida, and that a low cost of transportation is essential to its development.

"While these local rates are essentially part of the through charge and should be dealt with by this Commission as such, it is difficult to see how these Florida railroads can render a proper service upon a lower scale of rates than is now applied. It must be remembered that without the railroad this industry could not exist at all, and that to its satisfactory carrying on the character of the service is fully as important as the rate. It is better that these fruits and vegetables should reach the market on time, and in good condition, than that a few cents per box should be subtracted from the carrying charge. There was very little complaint as to the service; nor did the shippers who testified manifest any desire that these carriers should be required to accept less than reasonable compensation for that service. Our conclusion upon this branch of the case is that the present rates up to the base points, while high in comparison with similar rates in other localities are as low as they ought to be under the conditions

obtaining upon these Florida lines, so that here, as in case of oranges, the real question arises upon the rate from the base point to the northern market." (p. 496.)

(c) Pineapples:

"Pineapples are mainly produced in Florida, upon the line of the Florida East Coast Railway, which extends, as already said, down the east side of Florida. This industry has within recent years developed rapidly. Florida pineapples today sell in all the markets of the United States in competition with foreign pineapples, usually commanding much higher prices than the foreign article. While the period of production in the United States and in Cuba is not exactly the same, still it may fairly be said that the two products do compete.

"It was said that Jansen might be selected as a typical producing point upon the Florida East Coast Railway. This station is 257 miles south of Jacksonville and the rate on pineapples is 24 cents per box of 80 pounds. Rates from other points are relatively about the same as from Jansen; somewhat lower, it will be seen, for the same distance, than from most producing points upon oranges." (p. 502.)

Presumably, deeming that the particular situation on the East Coast Line as to the character of its business, its location, its cost, etc., etc., required to be specially pointed out in addition to what was said in the passages quoted, the Commission said:

"The Florida East Coast Railway was built as part of a hotel scheme, and its principal business is the carrying of passengers who frequent these Florida winter resorts. Over 50 per cent. of its total receipts are from passenger traffic. Its most important freight business is the transportation of fruits and vegetables, and of these pineapples afford the most considerable amount of revenue. The management of the railroad has paid great attention to the development of this business. In the pineapple region highways are few and transportation by wagon is therefore costly. To relieve this difficulty sidings have been put in the pineapple region at frequent intervals. The traffic representative of this railroad stated that it was possible to load pineapples every half mile upon his line in the pineapple-producing region. When once loaded great attention is paid to sending the fruit to Jacksonville upon a reliable and expeditious schedule.

"Very elaborate tables were introduced showing the cost of constructing this railroad and the financial results of its past operations. These statements and tables have been examined

by the Commission, but it does not seem necessary to reproduce them here or to state in detail the grounds of our conclusions. But for this railroad the pineapple industry in Florida would not today exist. The quality of the service rendered that industry by this road is not criticised. The shippers of this fruit ought not to object, nor do they object to paying a fair compensation for the service, and in our opinion the present rates do not exceed such just compensation for the transportation of pineapples from various producing points to Jacksonville, and we so hold." (p. 503.)

And concerning the earnings of the East Coast Line, it was said:

"The total earnings of the Florida East Coast Railway for the same year (ending June 30, 1907) were \$5,911 per mile, and its operating expenses \$4,502. The greater part of the receipts of this railroad are from its passenger service. The evidence shows that a considerable portion of what little freight revenue it has comes from the transportation of fruits and vegetables. It has given in the past great attention to this service, and has apparently satisfied its patrons in this respect. It makes no through rates, but receives its full local in all cases up to Jacksonville." (p. 484.)

Giving effect to the foregoing, the Commission held that the complaint as to gathering charges was wholly unfounded, and they were maintained. A different conclusion, however, was reached as to charges from the base points to points of distribution or consumption, as to which some reduction was made. It consequently follows that all the other roads who were defendants were subjected to some reduction as to their rates, while the East Coast Line because of its being a purely gathering road was subjected to no reduction whatever.

Within a year after this action by the Commission the same complainant commenced a new proceeding (No. 2566) against two hundred railroads, including among others the East Coast Line, to establish carload rates from base points in Florida to interstate points. At the same time in No. 1168, which as we have seen had been previously passed upon by the Commission and decided in favor of the East Coast Line, a supplemental petition was filed against that road, the sole complaint against the East Coast Line in such petitions being as to its gathering rates on pineapples from points of production to Jacksonville. And it is to be presumed that the complaint as to pineapple-gathering

rates was made only against the East Coast Line because as we have seen, as stated by the Commission, that road was almost the exclusive carrier of such product, and in fact had virtually built up that industry. The controversy while it involved a claim of reduction, in its broad aspect presented only a controversy as to whether there should be put in force carload and less-than-carload instead of any-quantity rates in the performance of its duty of gathering pineapples. On the filing of the new and original as well as of the supplemental petition the Commission directed the rescinding of its previous order concerning the reasonableness of gathering rates, as well as its finding on the subject of rates from base points and directed the matter to be reheard. Without referring to the conclusion of the Commission concerning the controversy as to the many railroads who were before it as to their interstate rates, we come to state the ruling of the Commission as to the East Coast Line (17 I. C. C. 552, 564):

"The evidence produced upon the present hearing suggests no change in what was said so far as that applies to the Florida East Coast Railway. That line operates at the present time 477 miles of main line and 106 miles of branches. It has a first mortgage of \$10,000,000, a second mortgage of \$20,000,000, and a capital stock of \$3,000,000, making in all \$33,000,000. This capitalization, with the exception of about \$4,000,000, represents an actual cash investment.

"It is urged by the complainant that the portion of the line from Miami south, which has cost some \$14,000,000, was not at the present time a paying investment and that the balance of the line from Jacksonville to Miami, which is used by the growers of pineapples, ought not to be taxed with the cost of this construction. Admitting this to be so and laying out of view altogether the \$14,000,000 which have been invested in that part of the property, it is still true that during the entire existence of the Florida East Coast Railway, so far as this record shows, that property has never earned in any single year 6 per cent. upon the money invested, with the single exception of the year 1909. During much of the time its net earnings have been but little above its operating expenses. We certainly cannot hold that these rates should be reduced because for a single twelve months, under what may be termed abnormal conditions, this railway earned about 6 per cent. on the money which has been actually invested in its construction. The years when no return has been received must certainly be given some consideration. Upon no

other theory could private capital be induced to invest in the construction of railroads.

"While, however, we adhere to what was said in the previous case, we do think, upon more careful examination, that these rates of the Florida East Coast Railway on pineapples ought to be somewhat revised. They are not consistent with one another, and in our opinion those from the more distant points are too high as compared with rates from nearby points.

"The present rates are in any quantity. About 60 per cent. of these pineapples move from the point of origin in carloads, 40 per cent. in less than carloads. Carload shipments are stripped and loaded by the shipper and are not unloaded at Jacksonville, which probably saves the carrier not far from 2 cents per box. The less-than-carload shipment is loaded by the railway and usually unloaded at the station in South Jacksonville or Jacksonville. In our opinion carload rates should be established which are less than the present any-quantity rates by 3 cents per box.

"The establishment of such carload rates will not of a certainty work a decrease in the net earnings of the carriers. It is a false theory of transportation which seeks to force the shipper to avail himself of a less-than-carload service, which is more expensive to render, for the purpose of increasing the gross revenues of the carrier. The true object should be to perform the service in the most economical manner and to charge for that service reasonable compensation. In the end this makes to the advantage of both the carrier and its patron. The vice-president of the Florida East Coast Railway stated that he had always thought that carload rates should be established and that in his opinion to establish carload rates 3 cents per box less than the present any-quantity rates would not prejudice the net revenues of his company, since he would make up by saving in operating expenses what he lost in gross income."

The order of the Commission which gave effect to these views entered February 8, 1910, changed gathering charges on pineapples and citrus fruits on the East Coast Line from any-quantity to carload and less-than-carload rates and modified the mileage basis. On attention being directed to the fact that the complaint related only to pineapples, while the order applied to that product and to citrus fruits, the order was modified and restricted to the subject complained of, pineapples. The East Coast Line conformed to the order and indeed shortly after doing so also volun-

tarily put into effect carload and less-than-carload gathering rates on citrus fruits and vegetables, and although the rates thus fixed were somewhat higher than the rates on pineapples which the Commission had established, they were lower than the citrus fruit and vegetable rates which had been expressly sustained by the Commission. Some months after this was done the same complainant who had filed the previous petitions presented in No. 1168 a second supplemental complaint against the East Coast Line, and new petitions against the Seaboard Air Line and Atlantic Coast Line Railways (No. 3808). So far as the East Coast Line was concerned the complaint was against the citrus fruit and vegetable-gathering rates and asked that they be equalized with or made the same as the pineapple rate. The Florida Railroad Commission intervened and asked the same relief. The Commission in effect granted the prayer of this second supplemental complaint, found the rates of the East Coast Line on citrus fruits and vegetables to be unjust and unreasonable, and directed the putting into operation of a lower stated schedule of gathering rates which was made applicable not only to the East Coast Line but also to the other roads which were parties to the proceeding. And it is this order which the railroad refused to obey and to enjoin the enforcement of which this suit was brought.

Without going into detail it suffices to say that the report of the Commission concerning the action just stated did not purport to question the correctness of its previous findings sustaining the citrus fruit and vegetable rates of the East Coast Line, but was based upon what was deemed to be a change in conditions since the previous decisions. After pointing out that it had previously ordered a change from any-quantity to carload and less-than-carload rates on pineapples from gathering points to the base point on the East Coast Line and on all fruits and vegetables from base points outward, and that on both the Atlantic Coast Line and the Seaboard Air Line any-quantity rates yet remained from gathering points as to all fruits and vegetables, although such was not the case as to the East Coast Line because of the change which it had voluntarily made, it was said (22 I. C. C. 11, 14, 15):

"No material change has taken place since then (that is, since the previous decisions) so far as this record discloses which would lead to a different conclusion if the same subject were before us today. The volume of business transacted has increased, but

the expenses of operation have also increased to an extent which offsets the greater amount of business. . . .

* * * * *

"It appeared in the original case that citrus fruits to some extent, and vegetables to a much greater extent, were shipped in small lots to Jacksonville and there reloaded for movement beyond. It was our impression in establishing carload rates from the base point that this would permit the movement in small lots up to the base point and the consolidation at such point, and that the carload movement would in fact be mainly beyond the base point. Such has not been the result. In order to obtain the carload rate beyond the base point it seems to be necessary for the shipper, in actual practice, to present a full carload at the point of origin, and from this it follows that the movement up to the base point at the present time is entirely different from what it was when we approved these any-quantity rates. At that time the loading was by the carrier; now it is mainly by the shipper. The loading of the cars from the point of origin to the base points is much heavier now than formerly. In 1907 the average loading of citrus fruits and pineapples upon the Atlantic Coast Line up to the base point was 215 boxes. In 1910 this loading had increased to 279 boxes. In case of vegetables the increase is even more marked. The number of cars now required to transport the same amount of this traffic from points of origin to base points would be materially less than in 1908. Otherwise stated, it costs the shipper more to handle his business today and it costs the railroad less."

And upon that changed circumstance an order was awarded directing the change from any-quantity to car-load and less-than-carload and fixing a rate which was the same as that previously fixed for pineapples. Of course, as the East Coast Line had voluntarily put in carload and less-than-carload rates, it was only affected by this order to the extent that it lowered the traffic charge as contained in the schedule which had been previously voluntarily established.

It is insisted that the order of the Commission was wrongful and that the court below erred in not restraining its enforcement for the following reasons: (a) because the order complained of was rendered without any evidence whatever to sustain it; (b) because it confiscated the property of the railway in a two-fold aspect, first, by fixing a rate so unreasonably low as to afford no

remuneration to the corporation for the use of its property, and second, because although the Commission in order to justify the rate which it fixed took into account the revenue derived from the extended road, it nevertheless declined to at all consider the value of the extended road and the right to earn a return thereon. We come as briefly as possible to consider these contentions separately.

(a) *That there was no evidence whatever tending to sustain the reduction of the rates on citrus fruits and vegetables as to the East Coast Line which the Commission ordered.*

While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding and may not be reexamined in the courts, it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide. (*Int. Com. Comm. v. Louis. & Nash. R. R.*, 227 U. S. 88, 91, 92, and cases cited.)

In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects, the one the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. As to the first, in view of the statements made by the Commission in its report in the original case (No. 1168, 14 I. C. C. 476) as to the earning power of the road, the nature of its business and the reasonableness of its rates and the express finding that the citrus fruit and vegetable rates were just and reasonable and should not be changed and the further fact that they were not called in question in the second proceeding it follows that the inquiry narrows itself to the mere consideration of the testimony taken in this proceeding, and the report of the Commission in such proceeding, and the testimony taken before the court below in so far as it is proper to consider it in connection with the particular question under consideration. But coming to make a review of the testimony before the Commission on the issue raised by the second supplemental petition, we fail to find the slightest proof tending to sustain the reduction in rates as to the East Coast Line, which was made.

There are only three subjects referred to in the testimony which can in any view be considered as having any possible tendency

to show such a change as would cause the rate which was found by the Commission in the past reasonable and not to justify a change to be unreasonable and therefore require reduction. The three subjects are these: (a) testimony by the chairman of the Florida Railroad Commission that there had been a considerable increase in the volume of traffic in citrus fruits and vegetables since the previous finding; (b) a further statement or admission made by an officer of the East Coast Line in a colloquy which took place at the hearing in this case to the effect that as shippers under carload rates loaded their own cars there was some difference in cost to the advantage of the road over the cost of loading when the any-quantity rates prevailed; (c) testimony with reference to the Atlantic Coast Line and the Seaboard Air Line (but none as to the East Coast Line) to the effect that on those roads it had come to pass that there was a saving in expense and an increase in earning capacity because even under the any-quantity rates carload shipments had greatly increased and cars so shipped were much more heavily loaded and moved from the point of production through the base point to their ultimate destination, when such was not the case at the time the previous order was made. Testimony which as we have seen was expressly declared by the Commission to be in effect the cause which gave rise to the reduction. But at once it is to be observed that so far as any inference alone from the difference between carload and less-than-carload rates and any-quantity rates is concerned it had no application to the East Coast Line since that road had put in the carload and less-than-carload rates while the other two roads had not. And so far as the consideration of the increased loading is concerned as stated by the Commission, whatever may have been the proof as to the Seaboard Air Line and the Atlantic Coast Line, it is beyond controversy that no such proof can be found in the record as to the East Coast Line except the vague intimation to which we have referred.

Thus by analysis the case comes to this: Did the facts as to the increased loading which the Commission found to exist in the case of the Seaboard Air Line and the Atlantic Coast Line support or tend to support the order as to the East Coast Line in the absence of all testimony in the record concerning the existence of such fact as to the traffic on that road? In other words, the question is, Because there was testimony as to the traffic of those roads, can such testimony be said to tend to establish the same condition on the East Coast Line? Conceding that from an

abstract point of view an affirmative answer would have to be given to such question we think such is not the case here for the following reasons: (a) because of the difference in business carried on by the two roads named and the East Coast Line, they being not only gatherers of the local product but trunk line carriers; (b) because of the difference in the situation and traffic of the two trunk lines named and the East Coast Line, as deduced solely from the peculiar environment and movement of business on that road so aptly stated in the passages from the reports of the Commission which we have quoted. Differences which presumably gave rise to separate statements in the previous reports in considering that road. While we do not say that the conclusion is affirmatively sustained, nevertheless we think the state of the record at least tends to give some support to the suggestion in the argument that the greater magnitude and importance of the consideration of the business and rates of the two trunk line carriers concentrated attention in that direction and therefore caused the inquiry on that subject and the facts concerning the same to eclipse the distinctions between those lines and the East Coast Line — distinctions which if otherwise taken under consideration should have produced a different result.

As it follows from these views that the order in question as to the East Coast Line and its enforcement should have been enjoined by the court below, our duty is to reverse the action of that court and to remand the case to the proper District Court with directions to grant the prayer of the East Coast Line and restrain the enforcement of the order in question and it is so ordered.

Reversed.

THE LOS ANGELES SWITCHING CASE.¹

234 U. S. 294 (1914).

The facts are stated in the opinion.

Mr. Blackburn Esterline, Special Assistant to the Attorney General, with whom the Solicitor General [*Davis*] was on the brief, for the United States, Intervenor.

¹ Docket title of this case is Interstate Commerce Commission, The United States of America, Associated Jobbers of Los Angeles, and Pacific Coast Jobbers and Manufacturers Association, appellants, *v.* Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Company, and San Pedro, Los Angeles and Salt Lake Railroad Company.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Fred H. Wood and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap*, *Mr. T. J. Norton*, *Mr. C. W. Durbrow*, *Mr. W. F. Herrin* and *Mr. P. J. Blair* were on the brief, for appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Atchison, Topeka and Santa Fe Railway Company, the Southern Pacific Company and the San Pedro, Los Angeles and Salt Lake Railroad Company, brought this suit against the Interstate Commerce Commission in the Circuit Court of the United States for the District of Kansas, first division, to restrain the enforcement of an order of the Commission made in April, 1910. The order required these companies to desist 'from exacting their present charge of \$2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits' in Los Angeles, California, when such carload freight 'is moving in interstate commerce incidentally to a system-line haul.' It also prohibited the exaction of any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight in such cases.¹

After answer had been filed by the Commission, the suit was transferred to the Commerce Court, and the United States, the Associated Jobbers of Los Angeles and the Pacific Coast Jobbers' and Manufacturers' Association, intervened. The United States thereupon moved to dismiss the bill for want of equity and the petitioners asked for a preliminary injunction. The Commerce Court, denying the Government's motion, suspended

¹ The order is as follows:

"This case being at issue on complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and having found that the present charge of \$2.50 per car exacted by the several defendants for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits at Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul, is in violation of the act to regulate commerce:

"It is ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting their

the Commission's order until the further order of the court (188 Fed. Rep. 229, 929); and this appeal is prosecuted.

The complaint of the petitioners in substance is that they have established in the city of Los Angeles their public terminals, including what are known as team tracks and freight sheds, for the accommodation of the public in receiving and delivering carload freight; that these facilities are entirely adequate for the purpose, and are sufficient to handle all the carload freight shipped or delivered in the city, including that now received or delivered upon the industrial spur tracks in question; that the spur-track service has been established simply for the convenience of the shippers thus served; that it is a service essentially distinct from the line haul, and additional thereto, being of great benefits in the saving of cartage charges to the favored shippers for whose use the spur tracks were constructed; that the industries or plants located upon the spurs are distant from the main tracks, in the case of the Atchison Company from 1-5 mile to 3½ miles, in that of the Southern Pacific Company from 200 feet to 7 miles, and in that of the San Pedro Company from 1-5 mile to 4 miles, and that the special switching service involves a much greater expense than if the carload freight were received or delivered on the team tracks or at the freight sheds of the carriers respectively; that the charge of \$2.50 per car for this service is entirely reasonable and one which the carriers are entitled to make in addition to the line-haul rate; and that as such it has been duly specified in their published tariffs. It is also averred that, while in the contracts governing the construction and maintenance of the spur tracks no specific sum was prescribed for the service of receiving and delivering carload freight thereon, the charge above mentioned had been generally established; that at the time of the making of these contracts the shippers understood

present charge of \$2.50 per car for delivering and receiving carload freight to and from industries located upon spurs and sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul.

"It is further ordered, That said defendants be, and they are hereby, notified and required to cease and desist, on or before the 1st day of July, 1910, and for a period of not less than two years thereafter abstain, from exacting any charge whatever, other than the charge for transportation from points of origin to destination, for delivering or receiving carload freight to or from industries located upon spurs or sidetracks within their respective switching limits in the said city of Los Angeles, Cal., when such carload freight is moving in interstate commerce incidentally to a system-line haul."

and willingly consented that, if the railway company performed this special service, there should be additional compensation and that such charge has generally been maintained and collected. The adequacy of the public terminal facilities for carload freight in Los Angeles (consisting of the team tracks and freight sheds of the carriers respectively), the facts set forth with respect to the construction of the spur tracks, their location, the acquiescence in the switching charge and its maintenance, were established before the Commission, it is alleged, by undisputed evidence. It is further stated that on account of water and other competition, the rates of transportation to and from Los Angeles have been forced to an exceedingly low basis so that the companies do not receive the amount to which they are justly entitled and that they ought not to be required to perform the service in question without reasonable reward. The Commission's order was assailed as beyond its authority, involving a discrimination in favor of the owners of plants located upon the spur tracks and a deprivation of the property of the carriers without due process of law.

The report of the Commission (18 I. C. C. 310) was made a part of the bill. It appears that the proceeding before the Commission was instituted by the Associated Jobbers of Los Angeles and was directed against two distinct practices, involving the spur-track switching charges incident to a system-line haul and to a foreign-line haul respectively. The propriety of such a charge when the line haul was by a foreign carrier was sustained, and the prohibitory order was confined to cases where the charge was made in connection with a system-line haul. The pertinent facts as found by the Commission are substantially as follows:

Each of the carriers has designated certain territory as within its switching or yard limits in the city of Los Angeles, extending for 6 or 7 miles in a general easterly and westerly direction, and including numerous tracks, main lines, branch lines, industry spurs, classification tracks, team tracks, freight-shed tracks, hold tracks, repair tracks, and others, and also their stations, freight sheds, derricks, roundhouses, and other structures. Freight moving in carloads is delivered at team tracks, at freight sheds, or at industry spurs. At team tracks and freight sheds no charge is imposed for the receipt or delivery of such carload freight over the freight rate named in the tariffs, while at industry spurs an additional charge of \$2.50 is imposed on every loaded car moving either in or out. These industry spurs vary in length,

some leading directly from the main track into or alongside of the industries served, while others are of greater length and branch at one or more points, short spurs running off from what is known as the 'lead' to serve other industries in the immediate neighborhood. These spurs have been constructed under substantially uniform contracts.¹ None of the industries at Los Angeles furnishes its own motive power, and interline switching is done from the interchange track to the industry by the locomotives of the delivering line, the carrier performing the switching service.

The Commission found that these spur tracks were portions of the terminal facilities of the carriers with whose lines they connected, being distinguished from mere plant facilities such as were under consideration in *Chicago & Alton Ry. Co. v. United States*, 156 Fed. Rep. 558, and in the cases of the *General Electric*

¹ The standard form of the Southern Pacific Company provides as follows:

"1. Undersigned (shipper) will pay cost of constructing above-described track (rails, splices, bolts, switches, frogs, switch stands, and connections to be furnished by and at the cost of Southern Pacific Company), whether such cost may be more or less than amount of foregoing approximate estimate.

"2. Said track shall be under full control of Southern Pacific Company, and may be used at discretion of said company for shipments or delivery of any freight, but the business of the undersigned shall always have preference.

"3. All material in said track furnished at expense of Southern Pacific Company, whether in original construction or by any way of replacements or repairs, shall be and remain exclusive property of Southern Pacific Company, and said Southern Pacific Company shall keep said track in repair.

"4. In case said track shall not be used by undersigned for period of one year, said Southern Pacific Company may, at its option, remove said track.

"5. All goods shipped from or to said track by rail, routing of which is controlled, or may be reasonably held to be controlled, by or through undersigned, shall, when forwarded, be over such railroads as may be selected by Southern Pacific Company, provided rate of charge shall be as low as that from or to point in question by any other rail route."

The Sante Fe contract contains this provision:

"The title to said track, and to all the rails, ties, bolts, switches, fastenings, and fixtures connected therewith, and to all other property which may be furnished by the railway company in the maintenance of said track, shall at all times be and remain in said railway company, and said railway company may use the same for other purposes than the delivery of freight to or the receipt of freight from the second party, provided that such use shall inconvenience the business of the second party as little as possible consistent therewith; and at any time after the termination of this contract or the obligation of the railway company, as herein provided, to maintain such track, the railway company shall have the right to remove said track and every part thereof."

Company and Solway Process Company, 14 I. C. C. 237, 246. Each of the spurs here considered, said the Commission, is in a real sense a railroad terminal at which the carrier receives and delivers freight. It further appears from the report that the charge for spur-track delivery has been made by all of the carriers at Los Angeles as long as the railroads have had access to that city; that it was first imposed by the Southern Pacific and as the other lines came in they adopted the policy of the line already there; that as to certain commodities the charge was not imposed until quite recently and at all times until the Hepburn Act went into effect there was great variation in charge as between individual shippers. It is added that there are 97 places in California to which what are known as coast terminal rates apply, rates lower than to intermediate points; only in Los Angeles, San Francisco and San Diego is there such a charge for spur-track delivery, though in many of these places such delivery is furnished. To the north, in Portland, Seattle, Tacoma, and a large number of other points which also enjoy coast terminal rates, the Southern Pacific, Northern Pacific and Great Northern lines, impose no such charge, and to the east where defendants' lines have their termini in cities competing with Los Angeles, this charge is also unknown.

The Commission thus described the character of the service in question: "Spur-track delivery is a substitute service, a service which it has solicited the right to give, as the evidence here shows, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.

"Again it is not to be overlooked that the delivery given on an industry spur is not supplemental to any other delivery. Cars destined to industry spurs are not placed first at a spur, depot, or on the team tracks, or at the sheds, and later switched to oblige the consignee. A train of freight cars goes to the breaking-up yards which lie at the entrance to the city, and there it is divided up with respect to the character of the freight in the

various cars and their destination. No one has access to the cars at this point. This yard is purely a railroad facility. After the cars are segregated they are taken to the tracks to which they are ordered — some to the various team tracks distributed along the main line, some to different industries, some perhaps to the railroad shops or to freight sheds or to the stock yards. Before the cars are placed the consignees are given notice of the tracks to which they are to be sent, so that there is no confusion, and the switch engines which place the cars on one track also serve to haul the 'loads' in and 'empties' out at the other tracks. After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.

"An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." 18 I. C. C. pp. 317, 318.

1. It is urged that the Commission's order rests upon a construction of the statute which would forbid any carrier from separating its terminal and haulage charges on the same shipment, and that this is a fundamental misconception of the law.

We do not think that the order is open to this objection. It is true that the Commission directed attention to the distinction between the American and English methods of stating rates, pointing out that the English practise of fixing separate schedules for 'conveyance' and 'station terminal' rates had not obtained in this country so far as the records of the Commission show. The opinion was expressed that the provisions of the Act to Regulate Commerce were enacted with reference to the American method of rate-making and that the rate which the statute requires to be published is 'a complete rate,' including 'not only the charge for hauling but the charge for the use of the terminals at both ends of the line.' 18 I. C. C. pp. 315, 316. We need not

stop to consider whether this is a correct interpretation of the act, for the question of a segregation of haulage and terminal charges (meaning, by the latter, charges for the use of ordinary terminal stations in receiving and delivering goods) was not before the Commission and its propriety was not necessarily involved in the decision. No such segregation had been attempted by the carriers here. On the contrary, it was undisputed that the line haul carload rate comprehended receipt and delivery on team tracks or at freight sheds.

The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.

2. Nor do we understand that the Commission ruled that the receipt and delivery of goods at plants located upon spurs or side-tracks could not, in any circumstances, be regarded as a distinct service for which separate compensation might be demanded. Cases of an interior movement of plant traffic to and from various parts of the establishment, and of deliveries through a system of interior switching tracks constructed as plant facilities, were expressly distinguished by the Commission (18 I. C. C. pp. 313, 314); and it is apparent that the ruling of the Commission would not apply in any case where by reason of the location and extent of the spur tracks and the character of the movement the facts were essentially different from those upon which the decision was based. (*Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 105.)

3. On the other hand, it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits in a city is necessarily an added service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-track service is a substitute. It is said that carriers are bound to carry only to or from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which also various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system. It was stated by the Commission that carriers throughout the country treat industry spurs of the kind here in question 'as portions of their terminals, making no extra charge for service thereto when the carrier

receives the benefit of the line haul out or in.' It was added that while this general statement covered perhaps ten thousand cities and towns in the United States, the carriers before the Commission could name only three exceptions, to wit, the cities of Los Angeles, San Francisco and San Diego. But, laying the generalization on one side, it is plain that the question whether or not there is at any point an additional service in connection with industrial spur tracks upon which to base an extra charge, or whether there is merely a substituted service which is substantially a like service to that included in the line-haul rate and not received, is a question of fact to be determined according to the actual conditions of operation.

Such a question is manifestly one upon which it is the province of the Commission to pass.

4. We must therefore take the findings of the Commission in the present case as to the character and manner of use of the industrial spurs in Los Angeles — that they constituted part of the carrier's terminals and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds — as conclusions of fact. Assuming that they were based upon evidence, they are not open to review. *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 381, 495; *Interstate Commerce Commission v. D., L. & W. R. R. Co.*, 220 U. S. 235, 251; *Interstate Commerce Commission v. Union Pacific R. R. Co.*, 222 U. S. 541, 547, 548; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 92; *Atchison, Topeka & Santa Fe Rwy. Co. v. United States*, 232 U. S. 199, 221.

In this view, we find no ground for holding the order of the Commission to be invalid. It is not denied that the complaining shippers and these carriers were heard before the Commission and that evidence disclosing the terminal situation in Los Angeles, and the nature and use of the various tracks within the switching limits, was presented; and it cannot be doubted that the case demanded an appreciation of a variety of details, or minor facts, in order that the ultimate questions of fact could be determined. It is said that it was established by undisputed evidence that the team tracks and freight sheds provided by the carriers were fully adequate for all carload freight. Putting aside the denial by the Commission of this allegation, it is evident that the question was not simply as to such adequacy, but as to the actual use of

the various tracks, the services thereon relatively considered, and whether there was really an extra service in the circumstances shown. Again, it is said that the Commission did not find the switching charge in itself, that is, taken separately, to be unreasonable, but the inquiry was whether in view of the conditions of the distribution of the carload freight through a large area there was in fact such a similarity of movement as to negative the basis for a separate charge. It is further urged that while the contracts for the construction of these spurs did not fix the charge, it was proved by undisputed evidence that at the time these contracts were made the shippers consented to a special charge, if freight were received and delivered thereon, and that the charge in question had been generally maintained. The service, however, was performed subject to the law of the land requiring that the carrier's charges should not be unreasonable or unjustly discriminatory. (See *Louisville & Nashville R. R. Co., v. Motley*, 219 U. S. 467, 482; *Phila., Balt. & Nash. R. R. Co. v. Schubert*, 224 U. S. 603, 613, 614.) If it became apparent that the shippers were subjected to an arbitrary and unwarranted exaction, they were in no way estopped from bringing the matter before the body created by law to deal with such questions and from securing its order directing the carriers to stop the objectionable practise.

But it is contended that the finding of the Commission is opposed to the admitted physical facts, and reference is made to the transportation to and from industrial plants located from 1-5 of a mile to 7 miles from the main track of the carrier. We find no such fundamental unsoundness in the Commission's conclusions. It appeared, as already stated, that the carrier had designated certain territory as within its switching or yard limits in Los Angeles extending for 6 or 7 miles and 'including numerous tracks, main lines, branch lines, industry tracks, team tracks, freight-shed tracks and various structures.' It does not appear how many industries were within a short distance or to how many the statement as to the greatest distance above-mentioned applied. The carrier did not fix a charge according to the comparative service in the case of these various industrial plants. It made the same switching charge whether the distance was 200 feet or 7 miles, that is, it dealt with the situation upon an average basis making the same charge for all this switching in a given area which constituted its terminal district. It was the service within these switching limits, that the Commission

was considering. Manifestly it was permissible to establish such a district, and taking the team-track and freight-shed service in that area, and the average spur-track service, the Commission reached the conclusion set forth. It is said that the finding of the Commission as to the comparative cost of the service was not affirmative, but was merely a negative statement to the effect that the Commission was unable to find that the cost of spur-track delivery was more expensive to the carrier. While this form of expression was used at one place in the Commission's report, at another the service in question was described as one which involved 'no greater expense than would team-track delivery' and we cannot but regard this as the Commission's finding upon the evidence. It is then insisted that the contrary of this finding is self-evident, but the facts with respect to the movement of freight in a great terminal district are by no means so simple that the deliberate judgment of the Commission can be regarded as contradicting the obvious.

The argument for the petitioners necessarily invites the court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province. This is not the function of the court. We cannot regard the Act to Regulate Commerce as justifying an increased or extra charge for a substantially similar service and upon the case made it cannot be said that the Commission has overstepped its authority in forbidding the charge in question as one which was unjustly discriminatory.

In our opinion the Commerce Court erred in denying the Government's motion to dismiss and in granting the petitioner's motion for injunction. The order of the Commerce Court is therefore reversed and the cause is remanded to the District Court of the United States for the Southern District of California, southern division, with instructions to dismiss the bill. Act of October 22, 1913, c. 32; Stat. 1913, p. 221.

It is so ordered.

UNITED STATES *v.* BALTIMORE & OHIO RAILROAD
COMPANY.

231 U. S. 274 (1913).

The facts are stated in the opinion.

Mr. Solicitor General Bullitt for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Ernest A. Bigelow for the Federal Sugar Refining Company.

Mr. George F. Brownell, with whom *Mr. H. A. Taylor* was on the brief, for the Railroad Companies, appellees.

Mr. H. B. Closson for the Brooklyn Eastern District Terminal, appellee.

Mr. William N. Dykman for the Jay Street Terminal and Arbuckle Brothers, appellees.

MR. JUSTICE LURTON delivered the opinion of the court.

The appeal involves the legality of an order made by the Interstate Commerce Commission holding that certain allowances made by the appellees to Arbuckle Brothers on sugar shipped by them over one or another of the railroad companies' lines constitute an illegal preference or discrimination in violation of the Act to Regulate Commerce. The order of the Commission required the railroad companies to cease and desist from paying such allowances, "while at the same time paying no such allowances to the Federal Sugar Refining Co.," on its sugar brought by it on lighters to the carriers at the same rail terminals. 20 I. C. C. Rep. 200. The carriers affected filed a bill in the Commerce Court alleging the invalidity and illegality of the order, and sought an injunction *pendente lite* and a permanent injunction against its enforcement. An injunction until the cause could be finally heard was granted by the Commerce Court. This was appealed from by the United States and the injunction sustained as within the sound discretion of the court below. 225 U. S. 306. Thereupon the cause was finally heard upon motion of the appellants to dismiss the bill for want of equity, all answers and pleas theretofore filed having been withdrawn. The Commerce Court denied this motion and sustained the equity of the bill. The appellants declining to further defend, the temporary injunction was made permanent. From that decree this appeal is prosecuted.

The situation out of which the questions for decision arise, shortly stated, is this:

The railroad companies held by the Interstate Commerce Commission to have discriminated in favor of Arbuckle Brothers and against the Federal Sugar Refining Company, are interstate trunk lines whose freight rail terminals are at the New Jersey shore of the harbor of New York. Transportation of freights into and out of the City of New York is practicable only by means of car floats, barges and steam lighters, operating between the city and the New Jersey shore.

To meet this condition the appellee railroads have long held themselves out as extending transportation of freights bound east to a defined area along the river front of the city and as beginning such transportation westbound when freight is delivered at designated points within the same area. The necessary lighterage service is performed without additional cost or charge, the flat rate into or out from such points being identical with that applicable at the New Jersey rail terminals. The limits within which such lighterage service is performed as a part of the transportation assumed have long been defined and published in the several filed rate sheets of the carriers. The district embraces substantially the commercial and manufacturing river front of Greater New York, and within it the railroads hold themselves out as undertaking to receive or deliver freight at any public dock, or at any accessible private dock where the shipper shall arrange for the use of the dock. Within this lighterage zone each of the appellees has established and long maintained public freight terminal stations, at which it will deliver eastbound freights and receive freights bound west. Some of these stations are owned or managed solely by one of the railroads and some are union stations operated for the joint use of two or all of the railroads. Some of them are operated by third persons, who manage and operate them under contracts as agents for one or more of the railroads. But whether operated under contract or directly by the company or companies using them they are represented to be public delivery and receiving stations, and are so set out in the filed tariff sheets of the companies interested.

The "allowance" to Arbuckle Brothers referred to in the order of the Commission is the consideration paid by the railroad companies to them for instrumentalities and facilities furnished and services performed in the maintenance of one of these public stations, known as the Jay Street Terminal, and for the lighterage

of all freight between that station and the railroad terminals on the New Jersey shore. Arbuckle Brothers, a co-partnership, are large refiners of sugar and dealers in coffee. Much of their product of sugar finds a market in the west at points upon the lines of the railroads here involved. Their refinery is upon the water front of Brooklyn. They also own a contiguous property fronting upon East River some 1,200 feet. Upon this property they have erected a dock, piers and large warehouses for the receipt of freight intended for transportation to the railroad terminals on the New Jersey shore, or received from such terminals for consignees nearby. They also own steam lighters, car floats, barges, etc., constructed for the transfer of cars, loaded or unloaded, between this dock and the New Jersey terminals. The premises were peculiarly adapted for use as a public union freight station, and for the purpose of extending transportation by their several lines to this portion of the commercial and manufacturing water front of Greater New York, the appellee railroad companies, in 1906, entered into separate, but identical, contracts with Arbuckle Brothers, the latter contracting under the business name and style of "The Terminal Company." The contracts are too lengthy to be set out. Their essential points may thus be summarized:

1. The Terminal Company agrees to maintain the premises in good order and condition for the receipt of freight and to provide all necessary boats, car floats, docks and piers, adequate at all times to receive, discharge, transfer and deliver freights, loaded and unloaded, adequate to accommodate the business contemplated.

2. The Terminal Company will receive at the New Jersey terminals all freights, in or out of cars, intended for delivery at the aforesaid freight station and safely convey the same to the premises and there make delivery to the consignees. It will also receive and load into cars all freights which may be delivered to it at its said premises for transportation over the lines of any of said railroad companies and carry and deliver the same to said railroad company's New Jersey rail terminals.

3. For the facilities supplied and the services performed each of the railroad companies agrees to pay on freight in and out of the station, a compensation measured by the tonnage handled for each such railroad of four and one-fifth cents per hundred pounds on freight originating at or destined to points west of what is called "trunk line territory," and on freight originating at or destined to points east thereof, three cents per hundred pounds.

Under these contracts, consignments to or by Arbuckle Brothers are handled in the same manner as the shipments of the general public, and comprise a part of the tonnage in and out of that station by which the compensation paid to the Terminal Company is measured. This fact was the basis of the complaint made by the Federal Sugar Refining Company, whose sugar seeks the same market, and who claimed that as it lightered its sugar from its own shipping dock to the terminals at the New Jersey shore the so-called "allowance" made in respect to the sugar of Arbuckle Brothers handled under the contracts referred to above, was an unjust and an illegal discrimination unless a like allowance was made to it.

The order of the Commission does not forbid the allowance to Arbuckle Brothers as in itself illegal or unreasonable, but forbids it only as a discrimination unless a like allowance is made to the Federal Sugar Refining Company. That there is no undue discrimination against the Federal Refining Company in refusing to make a like allowance to it will appear when the conceded circumstances and conditions are considered. This latter company is a competitor of Arbuckle Brothers in the sale and shipment of sugar to the same markets. Its refinery is located at Yonkers on the Hudson River, a point some ten miles beyond the limits of the free lighterage district. It owns its docks and piers upon the river, but has never enjoyed the free lighterage privilege accorded to all shippers from docks and piers inside the free zone under the tariff sheets of the carriers. It has therefore been compelled to furnish its own means for lightering shipments from its docks to the New Jersey shore. This is an undoubted disadvantage in competing with Arbuckle Brothers, as well as with all other refiners and shippers of sugar within the lighterage district. For many years it had an arrangement with the Ben Franklin Transportation Company, an independent transportation company, by which the latter transported its sugar directly from its Yonkers dock to the railway terminals on the New Jersey shore. There it was delivered to one of the appellees and a bill of lading signed. The freight rates under such bills were identical with the flat rate from stations and piers within the free lighterage district. This disadvantage arising from its location was made the subject of a prior complaint before the Commission, wherein it sought to have the free lighterage district extended so as to include its Yonkers docks, or to have an allowance made to it for the transportation of its sugar from its dock to the New Jersey terminals. Such relief

would have removed the disadvantage under which it had long labored. But this relief was denied and its petition dismissed without prejudice. In that proceeding it was ruled by the Commission that the free lighterage arrangements theretofore made by the carriers were the only available means by which they could extend their lines to New York and were not forbidden by the Commerce Act, and that by such extension the carriers had come under no obligation to extend the district to Yonkers. It was also ruled that the service rendered by Arbuckle Brothers in the lighterage of their own sugar from the Jay Street Terminal to the New Jersey shore was a service in aid of transportation and that for the instrumentalities and services, under the very contracts here involved, they did not receive an unreasonable consideration. 17 I. C. C. Rep. 40.

After the promulgation of that opinion the methods adopted for delivering sugar from the Yonkers dock to the New Jersey terminals were changed. The manager of the company's city office at 138 Front Street, would notify the manager of the refinery at Yonkers every morning of the sugar necessary to fill accepted orders. This necessary sugar was then loaded at the Yonkers dock upon the lighter Ben Johnson just as before. For this sugar the master of the lighter gave a receipt and was handed a document showing the Federal Sugar Refining Company to be the consignor and the consignee its city office, 138 Front Street. This document also gave the number, weight and description of the packages. The Ben Johnson would then go down the river to pier No. 24, within the free lighterage district, where the boat tied up, and the city office was notified, "thereupon," say the Commission, "the complainant issues shipping instructions to the transportation company and hands to its representative bills of lading for execution by the carrier upon delivery at the New Jersey shore." The lighter then proceeds to the Jersey shore where the sugar is delivered to the carrier and the blank bills of lading are signed and returned to the lighter's captain. For the service of the lighter in taking the sugar to pier 24 and then across the river to the railroad terminals, it is paid three cents per hundred pounds. The claim upon these facts was and is that unless an allowance is made to it identical with that made to Arbuckle Brothers for their service in respect to their own shipments of sugar, a discrimination unlawful in character will result. And this was the conclusion of the Commission.

The Commerce Court was of opinion that the circumstances and conditions were so dissimilar as not to make the same rule

applicable and that the result reached by the Commission was based upon manifest errors of law.

That pier 24 is within the free lighterage district and that the defendant carriers held themselves out as ready to take freight at any public or accessible private dock within that zone and lighter it across the river without any other charge than that published in their tariff sheets applicable alike to freight delivered to them at such dock or pier or at the New Jersey shore, is conceded. But the carriers have not established any public station at pier 24 and the Federal Company did not notify them, nor make any tender to them at that pier of their sugar for transportation. If such sugar had been tendered to them there and they had refused to receive it and lighter it at their own cost across the river, a very different question would have arisen. That such tender was not made was obviously due to the fact that the sugar when loaded on the Ben Johnson at their Yonkers dock was destined for the railroad terminals at the New Jersey shore and thence by rail to the real consignee, the purchaser of the sugar at western points on the carriers' lines. The sugar had been sold before it was loaded at Yonkers and the stopping at this pier and the receipt of unsigned bills of lading showing the consignees and destinations was, as the Commerce Court held, not a break in the continuity of the transportation, but a plain subterfuge to give the transaction the appearance of a shipment from pier 24. We agree with the Commerce Court and the minority of the Commission in thinking that the change in method after the failure to obtain relief in the first case did not change the substance of the transaction in point of law or fact. The claim by the Federal Company is a claim for an allowance on account of lightering done for their own convenience, a lighterage service which under the facts of the case the carriers were under no obligation to do as a duty of transportation. It was, therefore, a demand for a purely accessorial service, as much so as if they had claimed for carting their shipments to a depot or station.

Assuming then, that the lighterage service performed by the Federal Sugar Refining Company was a service by it for its own convenience for which the railroads were under no obligation to make compensation, we come to the question whether the facilities employed and the service performed by Arbuckle Brothers in respect to their own sugar after delivery at the Jay Street Terminal are accessorial, or services in aid of railroad transportation for which they may be paid a reasonable compensation without

discriminating unduly against the Federal Sugar Refining Company.

That the plain purpose of the contracts between the several railroad companies and the Terminal Company was to constitute the dock and warehouses of that company a public freight station is too clear for extended discussion. That the premises became such a depot through contract with the owners and not by virtue of a fee simple title or a lease is of no legal significance. *Railroad Commission of Kentucky v. L. & N. Railroad*, 10 I. C. C. Rep. 173, 175; *Cattle Association v. C., B. & Q. Railway*, 11 I. C. C. Rep. 277. Nor is there the slightest substantial evidence that in the selection of the premises of Arbuckle Brothers there was any purpose to give them as large nearby shippers any preference or to unduly discriminate against competing sugar refineries. The premises were ideally adapted to meet the necessities of the great manufacturing and commercial business interests along the river front of Brooklyn and constituted the only property reasonably obtainable by the railroads for the extension of their lines of transportation to the Brooklyn side of East River. That through instrumentalities furnished by the Terminal Company and the service by it performed transportation by the railroads begins and ends at this station, is most obvious. This continuity of transportation is not questioned by the brief for the United States in this case. Thus, after referring to the instrumentalities furnished and the services performed by the Terminal Company, it is said, "in connection with the further fact that all of the railroad companies make through rates from Brooklyn and New York to western points covering (1) the service performed by Arbuckle Bros., and (2) the transportation by rail from Jersey City westward, show such a continuity of transportation as to render argument unnecessary that the transportation from Brooklyn to western points is by one continuous transportation by railroad. The mere fact that the physical rails stop at Jersey City does not mean that the railroad transportation there ends. It continues over to Brooklyn by means of car floats, upon which further rails are laid and on which empty and loaded freight cars stand and are transported, so that the rails upon the cars float are brought into contact with the rail ends at Jersey City and the continuation thereof at Brooklyn, and in this way the transportation by railroad is carried on without interruption from the western points directly to Brooklyn."

It is true that this clear admission by the Solicitor General is made for the purpose of establishing a contention he makes,

namely, that Arbuckle Brothers under the name of the Terminal Company are in law and fact common carriers by railroad who violate the commodity clause of the Hepburn Act by transporting their own products, a view to which we later refer. The concession as to the continuity of common carrier transportation by railroad from and to this station under the published freight tariffs which include the services performed by the Terminal Company is not inconsistent with the view of the Commission, so far as transportation to and from that station is confined to the shipments made to or by one of the general public. Thus the Commission say: "So far as the general public is concerned the Arbuckle dock may doubtless be regarded as a public receiving station of the defendant." It is said further: "Arbuckle Bros., not only operate their station for the defendants as a railway facility, but they also perform the lighterage service between the dock and the regular station of the defendants on the west shore."

The order of the Commission is made to rest upon an erroneous assumption that the services performed by Arbuckle Brothers in respect of their own westbound shipments of sugar after the delivery of such sugar at this station is a shipper's service done for their convenience, with their own facilities, and, therefore, an accessorial service for which they cannot be allowed compensation unless a similar compensation is allowed to the Federal Sugar Refining Company for the lighterage of its sugar to the west shore railroad terminals.

That certain advantages enured to Arbuckle Brothers from the fact that their refinery was so near this public station that their product might be trucked or carted to the station at slight cost, as obvious. That this was a consideration which operated as an inducement to make these contracts, may be true. But this mere advantage of nearness was one which they shared in common with every other shipper who chanced to be near a shipping station. That they were large shippers was also more or less an inducement to the railroads to place their depot in a locality which would tend to secure their shipments as against rival carriers, may also be conceded. But these were business considerations which are far from showing any purpose to give them any illegal preference or to discriminate against other shippers. That the station constituted a great public utility by which the shipping public was served is too plain for argument. Although nearly one-third of all westbound shipments through that station were made by Arbuckle Brothers, the remaining two-thirds of the

tonnage was furnished by the general public. Thus, the uncontradicted averment of the bill is that during the first six months of 1907 the shipments of general merchandise through that station numbered 92,622 of which more than 85,000 were by shippers other than Arbuckle Brothers, though the tonnage of the latter aggregated nearly one-third of the total. Thus it is demonstrated that while Arbuckle Brothers are by far the largest shippers, yet the advantages of the station are availed of by thousands of the general public.

Upon all of the conceded facts of the case, we must conclude that the contracts by virtue of which the premises owned by Arbuckle Brothers were converted into a public freight station under their management as agents for the several carrier lines were contracts made in good faith and not as a cover for any fraudulent scheme to give rebates or any other illegal advantage. The case must turn here, as it did before the Commission and in the Commerce Court, upon the question whether the allowance to Arbuckle Brothers of compensation upon their own shipments was for instrumentalities and services accessorial in character. Thus the Commission say (20 I. C. C. 209):

"The complainant contends that in lightering their sugar to the Jersey shore and there delivering it to the defendants, Arbuckle Brothers perform what the complainant refers to as a purely accessorial service. We incline to think this a sound view of the matter upon the facts shown of record. Neither the actual possession of their sugar nor their relation to it is in any respect changed until it is delivered into the physical possession of the defendants at Jersey City. This fact is clearly developed upon the record. Arbuckle Brothers handle their sugar out of their own refinery to their own dock and themselves deliver it to the defendants west of the river, using in the process only property and facilities that are owned by them and employes that are paid by them. Moreover, under the terms of the contracts between them and the defendant carriers none of the duties, obligations, responsibilities, or liabilities of common carriers attaches to the defendants, with respect to the sugar of Arbuckle Brothers, until the defendants have actually received it at their regular freight stations west of the river. Yet it is here contended that, through some sort of alchemy in their provisions, these contracts transmute Arbuckle Brothers from shippers into carriers' agents while they are in the act of delivering their own sugar to themselves at their own dock. We are not necessarily controlled,

however, by the face of these documents or by the merely superficial relation that they purport to establish between these shippers and the defendant carriers, if, as seems to be abundantly clear upon a reading of their provisions, the real and actual relation of Arbuckle Brothers to the defendants, so far as their own sugar is concerned, is that of shippers, up to the moment of time when they physically deliver their sugar to the defendants on the Jersey shore. The contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk, and only from that moment does the carrier's risk begin. It is only when the defendants actually accept and physically take possession of the sugar at their receiving stations west of the river that they agree to, and do in fact, assume the liabilities of common carriers with respect to the sugar of Arbuckle Brothers."

We must now recur to the distinction drawn by the Commission between the compensation paid by the railroad companies to Arbuckle Brothers for the instrumentalities furnished and the service performed by them in respect of their own westbound shipments of sugar, and the compensation paid to them in respect to the freight handled by them through their station for the general public. The Commission find no fault with reference to the compensation paid for the latter but do find that the compensation paid for the former is an undue discrimination unless a like compensation is made to the Federal Sugar Refining Company for the lighterage of its sugar.

We have before noticed that the order of the Commission is in the alternative. The obvious inference is that the Commission found nothing unlawful *per se*, in the compensation paid to Arbuckle Brothers under the contract, although they are compensated upon a gross tonnage which includes their own sugar, for it sanctions its continuance upon condition that a like allowance shall be paid upon the sugar lightered by the Federal Sugar Refining Company. *Penn. Refining Co. v. Railroad*, 208 U. S. 208, 218.

But, as has already been shown the railroads were under no obligation to lighter the sugar of the Federal Sugar Refining Company. Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay Street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand

a compensation reasonably commensurate with the facilities furnished and the services performed. *Wight v. United States*, 167 U. S. 512; *General Electric Company v. New York Central Railroad*, 14 I. C. C. Rep. 237; *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46. In the case last cited, it is said:

"... the act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in § 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or now, upon its own motion. Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

This principle is not controverted, but the Commission failed to give it application, because, as shown in the excerpt from its report set out above, it construed this relation of Arbuckle Brothers, under the terms of the contract, in respect of their own shipments of sugar, "as that of shipper up to the moment of time when they physically deliver their sugar to the defendants at the Jersey shore." Again the Commission say, that, "the contracts expressly provide that until that moment the sugar is to be handled by Arbuckle Brothers at their own risk and only until that moment does the carrier's risk begin," etc. Of course, if this was the case, their services up to the time of delivery at the New Jersey shore, were shipper's services, purely accessorial, and not connected with or in aid of transportation by the railroad, and, therefore, a discrimination would result unless a like allowance was made to the Federal Sugar Refining Company. But this construction of the contract has no other basis than appears in the clause defining the responsibility of the Terminal Company to the contracting carriers while the freights remain in the Terminal Company's physical possession. That clause (3d) reads thus:

"The responsibility of said Terminal Company for eastwardly bound cars and the freights therein shall begin when the cars are placed upon its floats at the said float bridges at the aforesaid station of said Railroad Company, and shall continue as respects the cars until they have been returned by it, loaded or empty; and as respects the freights contained in eastwardly bound cars,

its responsibility shall continue until the actual delivery thereof to and acceptance by the consignees at Brooklyn. As respects the freights to be transported westbound, said Terminal Company's responsibility shall commence at the time the same is received from the consignor at its aforesaid premises, and shall continue until said freights, loaded into cars, have been brought to the float bridge of said Railroad Company at its aforesaid freight station and until the floats have been attached to the float bridge and the cars are in complete readiness for removal from the car floats by said Railroad Company."

That clause deals both with east and westbound freight and covers both the freight and the cars of the railroad company. It is too plain for argument that its only purpose is to fix the responsibility upon the contracting company for both the cars of the carrier and the freight of all shippers while in its physical possession. The liability imposed is between agent and principal and is substantially that imposed by general principles of law. It is plainly not intended to affect the responsibility of the carriers to all shippers after the receipt of freight for transportation, a responsibility which they hold themselves out as assuming by their published tariff sheets.

The contracts between the carriers and the Terminal Company make no distinction whatever between the duty and obligation of the latter company in respect to the shipments of Arbuckle Brothers as sugar refiners, and those made through their station by the general public. Nor was there any distinction recognized by the undisputed course of business under the contracts. When the shipments of Arbuckle Brothers were delivered at the station, carriers' bills of lading were then signed and delivered just as in the case of freight delivered by the general public. If carrier responsibility began at that station for the shipments of the public, it also began as to the freight there received from Arbuckle Brothers. The physical possession of the Arbuckle sugar, as stated by the Commission, remained with them until actually placed in the possession of the carrier on the New Jersey shore. But that is equally true as to the shipments of the general public. In both cases, however, the possession after such delivery and until delivered at the New Jersey shore was, under the contract, that of Arbuckle Brothers, under the business name of the Terminal Company, as agents of the carrier over whose lines the freight was routed and whose bill of lading had been duly issued. The Commission, while seeming to recognize this relation of agency,

in effect deny it as to the freight received and receipted for at the station if it constituted a shipment by Arbuckle Brothers. But neither the words, nor the purpose of the contract, nor the actual method of conducting the business, furnish the slightest reason for any such distinction as that drawn by the Commission. All freight, both in and out of the station, was handled in the same way.

The suggestion in the brief of the Solicitor General for the United States that "joint published tariffs are issued by the railroads and Arbuckle Bros.," has no other foundation of fact than that found in the seventh paragraph of the contract between the Erie Railroad and the Terminal Company, where it is said, that the Terminal Company, "shall not be required to receive or carry any freight which may from time to time be classed as prohibited freights in the joint published tariffs of itself and the railroad company." But there is not a scintilla of evidence that any such joint published tariffs have ever been filed or published, nor that the Terminal Company has ever published or been required to file any tariff sheets whatever. The filed tariff sheets showing the services performed by Arbuckle Brothers, and the facilities provided for extending transportation between the New Jersey terminals and this station, are those published and filed by the railroad companies, who thereby hold themselves out as common carriers to and from this station. That it might originally have been expected that the Terminal Company might join in such published tariffs is possible. That it never did, is plain.

To say that the "allowance" made to Arbuckle Brothers is an allowance for lightering their own sugar across the river is to only half state the case. This so-called allowance is not only for such lighterage service, but is also compensation for the use of all of the terminal properties, docks, warehouses, tracks, steam lighters, car floats and every instrumentality used under the contract. It includes the services and responsibility of Arbuckle Brothers, as agents for the several lessees using the station, and their staff of employes engaged in receiving, delivering, loading and unloading freights thus received, both incoming and outgoing. As the measure of compensation is the tonnage in and out of the station and as this compensation is paid by the several railroads maintaining the station in proportion to the tonnage which they severally handle, there is a sense in which it is in part an allowance to Arbuckle Brothers upon their own shipments. But they receive the same compensation upon the tonnage of every other shipper

through that station, and it is the aggregate of the compensation which must determine the reasonableness of the allowance when we come to deal with it as an allowance to them for services or instrumentalities furnished, under § 15 of the Act to Regulate Commerce.

That the compensation of three and four and one-fifth cents per hundred pounds upon the total tonnage in and out of this station is not unreasonable was and is not challenged, and therefore we pass that subject by.

The contention to which we have hitherto referred that the arrangement made by the Terminal Company violates the commodity clause of the Act to Regulate Commerce is not necessary to be considered. There is nothing in the record showing that such a contention was pressed upon the Commission, considered by that body, or that the order rendered was in any respect based upon the commodity clause. Indeed, the order permitted the continuance of the Jay Street Terminal and the business there conducted, providing only that like rights and allowances were made to the Federal Sugar Refining Company. The order, therefore, cannot be assumed to have contemplated that the Jay Street Terminal business was a violation of the commodity clause, since under that hypothesis the conclusion would be inevitable that the Commission by its order gave sanction to and permitted the continuance of the wrong which its powers were exerted to suppress. As we do not consider the contentions concerning the commodity clause as properly arising for decision and hence do not pass on them, they are not foreclosed, and hence our action in this case will be without prejudice to the right to assert them in the future if those having the right to do so are so advised.

Viewing the whole case in a broad light, it is apparent that the disadvantage under which the Federal Sugar Refining Company labors is one which arises out of its disadvantageous location. That disadvantage would still remain if the title to the Jay Street station was in the railroad companies, and its business in charge of a third person.

We fail to find any error in the decree of the Commerce Court holding the order of the Commission void, and its decree is accordingly approved.

INTERSTATE COMMERCE COMMISSION v. CHICAGO,
ROCK ISLAND & PACIFIC RAILWAY COMPANY.

BURNHAM, HANNA, MUNGER DRY GOODS COMPANY
v. SAME.

218 U. S. 88 (1910).

The facts are stated in the opinion.

Mr. Wade H. Ellis and *Mr. Luther M. Waller*, Special Assistants to the Attorney General, with whom *Mr. Edwin P. Grosvenor*, Special Assistant to the Attorney General, for the Interstate Commerce Commission, appellants in No. 663.

Mr. John H. Atwood and *Mr. John Lee Webster*, with whom *Mr. George T. Bell* was on the brief, for appellants in No. 664.

Mr. William D. McHugh and *Mr. Colin C. H. Fyffe* for appellees.

Mr. Frederick Manley Ives and *Mr. Everett M. Burdett* filed a brief as *amici curiæ* on behalf of the Boston Chamber of Commerce and certain other business organizations.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The question in the case is the validity of an order of the Interstate Commerce Commission reducing the class rates charged by the appellee railroad companies on through freight shipped from the Atlantic seaboard to Kansas City, and St. Joseph, Missouri, and Omaha, Nebraska, cities on the Missouri River and called throughout the record, and in this opinion, Missouri River cities.

The through class rates were reduced from $1\frac{1}{4}$ $1\frac{1}{8}$ $\frac{3}{4}$ $\frac{5}{8}$ $\frac{3}{4}$ in cents per 100 pounds to $1\frac{1}{8}$ $1\frac{1}{4}$ $\frac{3}{4}$ $\frac{5}{8}$ $\frac{3}{4}$. The numbers above the lines indicate the classes and the numbers below the lines the rates.

The reduction was made in that part of the through rate which applied to the haul between the Mississippi and Missouri Rivers. Explaining its order of reduction, the Commission said the through rates from Atlantic seaboard terminals to the Missouri River cities are made by adding together the rates from points of origin to the Mississippi River crossings, using proportional rates when such were available, and the local rates from the Mississippi crossings to the Missouri River cities. The through rates the

Commission pronounced to be unreasonably high, "because those portions of the through rates which apply between the Mississippi River crossings and the Missouri River cities are too high. These are defendants' 'separately established rates,' which are 'applied to the through transportation,' and, therefore, the through rates should be adjusted by reduction of those factors or parts thereof which are found to be unreasonable."

The division of the rates as established by the railroad was as follows: From New York to the several Mississippi River crossings on traffic moving through them to points beyond, in cents per 100 pounds, $\frac{1}{8}$ $\frac{7}{8}$ $\frac{3}{8}$ $\frac{1}{4}$ $\frac{5}{8}$. From the Mississippi River crossings to the Missouri River cities, $\frac{1}{8}$ $\frac{1}{8}$ $\frac{3}{8}$ $\frac{1}{4}$ $\frac{5}{8}$. The latter are local class rates under the Western classification, and are those which the Commission adjudged too high, and which it reduced in cents per 100 pounds, to the following: $\frac{1}{8}$ $\frac{3}{8}$ $\frac{3}{8}$ $\frac{1}{4}$ $\frac{5}{8}$. The amount of reduction, it will be observed, is nine cents on first-class freight and a proportional reduction on the other four classes.

The order of the Commission required the railroad companies to cease and desist on or before the twenty-fifth of August, 1908, from charging, demanding or collecting anything in excess of the rates last above set out, and the companies were required to put such rates in force before the twenty-fifth of August, 1908, and maintain them for a period of not less than two years.

The proceedings before the Commission were begun by a petition filed by appellants in case No. 664, who were doing business in Kansas City and St. Joseph, Missouri, and Omaha, Nebraska. They alleged that they were engaged in either the mercantile or manufacturing business, and in buying and selling various commodities shipped from the Atlantic seaboard to them, respectively, under the definite freight classifications maintained by the railroad companies. The rates, according to the classifications, from New York to St. Paul and Minneapolis and rates from New York to Chicago, and from the latter city to Kansas City, St. Joseph and Omaha, the petition alleged, "are arrived at by adding to the rates from Mississippi River points, as shown above, the following rates subject to official classification, to wit: 87c, 75c, 58c, 41c and 35c per hundred pounds for said five classes, respectively; that the aforesaid through rates, applying from New York to Kansas City, are observed by defendant carriers on traffic moving by way of Chicago; that in the division of said through rates from Atlantic seaboard to said three Missouri River cities,

Kansas City, St. Joseph and Omaha, each of said defendant railroad companies allows and pays to said Eastern connections 72.3c, 62.4c, 48.4c, 34.3c and 29.4c per hundred pounds on the said five classes, respectively; and charges, accepts and retains as their respective shares of said through rates upon the several classes aforesaid 74.7c, 57.6c, 44.6c, 33.7c and 27.6c per hundred pounds."

A table showing the distance of the various roads from New York to St. Paul and Minneapolis, and the Missouri River cities is given, which shows that the distances are not materially different, and also shows distances west of Chicago.

It is alleged that the rates charged and the classifications enforced by the company for the transportation of property from the Atlantic seaboard and other producing territory to the Missouri River cities "are in themselves unreasonable and relatively unjust, unfair and prejudicial as compared with rates from the same territory to St. Paul and Minneapolis," though the volume of tariff and the cost of handling it is not greater. Discrimination is alleged, with a detail of circumstances, against the Missouri River cities and the violation of the Interstate Commerce Act.

What are conceived to be reasonable rates are set out, and that the rates charged are alleged to be discriminatory against the complainants, and are excessive and unreasonable in and of themselves, because higher and greater than enough to pay the cost of transportation and maintenance and a fair profit on the valuation of the property employed.

The railroad companies filed separate answers, in which they admitted the charges and rates set out in the petition and the division thereof, but denied discrimination in favor of St. Paul and Minneapolis against the Missouri River cities and alleged competitive conditions, existing as to the first-named cities. They denied that the rates from the Atlantic seaboard to the last-named cities suggested by the petitioners would be reasonable or just, or that the rates charged are unduly high or excessive or discriminate against the Missouri River cities or the petitioners.

The Chicago and Northwestern Railway Company filed an amended answer, in which it alleged that the complaint related to the through rates from the Atlantic seaboard to the Missouri River cities, and that they were alleged to be unfair and prejudicial compared to rates to St. Paul and Minneapolis, and "unreasonable and excessive in and of themselves." And, further, that

the rates had been fixed and established by the railroad companies by virtue of joint traffic agreements, and had been duly filed, posted and published by the companies, and that all the companies to such agreements were necessary parties. Fifty or more companies were named.

The Eastern companies, (those operating east of Chicago), answering, denied that there was any agreement between them and the original respondents for the shipment and division of through rates between the Atlantic seaboard and St. Paul and Minneapolis, and alleged that in conjunction with their several connections they receive to Chicago the same rate in cents per hundred pounds as applied upon like tariff originating at the same points of origin and terminating at Chicago, and are not concerned with the rates or proportional rates charged or accepted by the different carriers from Chicago to St. Paul or Minneapolis. They also denied that they were parties to any joint tariff of class rates from the Atlantic seaboard to the Missouri River cities. They admitted participation in joint through class rates to Mississippi River points and denied that they, however, were unreasonable or unjust in or of themselves or as respectively applied to shipments destined to St. Paul or Minneapolis or shipments destined to points west of the Mississippi River.

They further alleged as follows:

"That the rates from New York city to East St. Louis, Illinois, are computed at 116 per cent of the rates from New York to Chicago according to relative distances, that the rates from New York to East St. Louis are part of a general structure of rates whereby all rates from New York and other Eastern points to points in the States of Ohio, Indiana, Illinois, Michigan, Pennsylvania, Kentucky and Wisconsin, and the Province of Ontario are made upon the bases of percentages of the rates from the points of origin to Chicago; that the said rates for the first five classes governed by the official classification from New York to East St. Louis of 87c, 75c, 58c, 41c and 35c per hundred pounds, respectively, are applied as proportional rates to the various Mississippi River crossings north of East St. Louis, to and including East Dubuque, Illinois, and that from other Eastern points than New York city the rates to East St. Louis apply equally to said Mississippi River crossings, and all of such rates to said Mississippi River crossings apply uniformly upon all shipments destined to all points west of the Mississippi River and east of Pacific coast terminals and points taking the same rates. Respondents

allege that all of the rates from Eastern points to said Mississippi River crossings are just and reasonable in and of themselves and as applied to shipments destined to any point west of the Mississippi River and east of Pacific coast terminals."

They alleged that the rates to the Mississippi River crossings are governed by the Official classification, and those from the latter crossings to the Missouri River points are governed by the Western classification, and that innumerable articles are differently classified in such classifications. That it would be impossible to establish joint through rates on the basis set out in the petition without simultaneously applying the official classification to all traffic from all Eastern points and all points intermediate between the rivers and establishing relative through class rates from all such Eastern points to all such intermediate points between the rivers, and that this would require a general revision and reduction of rates, which would cause great hardship and irreparable injury to the respondents and other interstate carriers not parties to the proceeding.

It is alleged that the reasonableness of the rates from Eastern points to Chicago and to the Mississippi River is not questioned by petitioners, and that the grievance of the latter, if they have any, lies in the rates applied by the original respondents from Chicago and the Mississippi River crossings to the Missouri River cities on shipments originating at Eastern points. They hence prayed to be dismissed. They were subsequently dismissed.

The Sioux City Commercial Club intervened and supported the petition, and prayed that whatever should be done for the other Missouri River cities should be done for Sioux City. The St. Paul Jobbers and Manufacturers Association and the Minneapolis Commercial Club intervened and in substance coincided with the views and interest of the defendant carriers.

A great deal of testimony was taken and the order made which has been recited. The appellee companies then filed a bill in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, for a temporary and permanent injunction against the order, that it be annulled, and the Interstate Commerce Commission be enjoined from enforcing it. A temporary injunction was granted. It was made permanent on final hearing, the court dividing. 171 Fed. Rep. 680.

The pleadings in the case are very voluminous. They consist of the bill of the railroad companies, the answers to it by the Interstate Commerce Commission and the intervening petitions

of certain other railroad companies, and mercantile and manufacturing concerns.

Even a summary of the pleadings would be very long and we shall, therefore, say but little more than that the allegations of the bill and those of the answer of the Commission and its denials are such as tend to the support of the respective contentions of the companies and the Commission, upon which we shall hereafter comment. We may, however, say further that emphasis is given to certain matters. The companies make prominent that two classifications of freight are in force upon which tariff rates are based, the Official classification from the Atlantic seaboard to the Mississippi River and the Western classification, between the river and the Missouri River cities; that the classifications materially differ and constrain different rates; that those between the rivers are just and reasonable and apply to all merchandise, whatever be its point of origin. That business conditions have grown up and are dependent upon the rates established, which will be disturbed by their alteration; that their alteration as required by the order of the Commission will compel a discrimination between shippers and localities, to do which is in excess of the powers of the Commission.

It is alleged that the rates are fair compared to the cost of service, absolutely and relatively, and that the rates east of the Mississippi River are not changed, the order affecting alone the proportion of the through rates charged by the complainant carriers, and will compel new through rates, which will not affect the proportion thereof received by the Eastern carriers.

And it is alleged that the Commission only has power to establish, after hearing on complaint, through rates and joint rates and prescribe the just and reasonable proportions of such rates between the carriers only when they (the carriers) fail to agree upon the proportion or division thereof, and that there was no evidence that they had failed to agree upon such rates or the proportion and divisions thereof, and that, therefore, the order exceeds the power of the Commission and deprives the companies of their property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

It is further alleged that there was no evidence that the rates between the rivers are unjust or unreasonable, except by comparison with other rates; that no evidence was offered of cost of service or of the various elements proper to be considered in determining whether a rate is just and reasonable in and of itself,

and that "the whole and only reason and the whole and only conclusion" of the Commission upon which the reduction was ordered was because the Commission decided that merchandise shipped from the Atlantic seaboard should be transported by the companies at a lower charge than that exacted for the transportation of an equal amount of merchandise when the same was shipped from St. Louis, Chicago or other points west of the Atlantic seaboard. And this, it alleged, is in excess of the powers of the Commission, misapplies the law, and compels the companies to serve a certain class of shippers at an unreasonable rate, and to take a rate lower than is charged other shippers for a like service, which involves less expense to the companies.

A loss of revenue is alleged, which will result in a deprivation of their property without due process of law, and that the enforcement of the order, even if it be finally set aside, will cause great disturbance to the business of the companies.

The Commission meets those points with denials of the facts alleged and their consequences, and opposes them as well by other facts and considerations.

It asserts that the bill has no equity because all the matters and things set forth therein are cognizable before it (the Commission), and it has the power to suspend, modify or amend its order as upon a proper showing might be proper; that it has information for such action, for under the law the operation and operating results of each railroad is required to be filed with it, "and the subject is under constant investigation." And in such investigation, it was alleged, many elements must enter, and that the fixed charges of maintenance and operation and the cost of operation and handling of different classes of freight, state and interstate, hauled on the same train, widely different in character and value, cannot mathematically be determined so as to apportion to each class of traffic its proper division of costs, and that no method of apportionment can be devised except that which involves the exercise of judgment, and the results vary according to the method used. The Commission, therefore, says that the statements and allegations of the bill are mere conclusions and opinions which necessarily involve consideration of all these complex and difficult problems and should not be accepted for the purpose of setting aside its order.

Supplementing this the Commission sets forth that on the hearing before it oral and documentary evidence was taken, to which it gave full consideration, and to the reports filed by the com-

panies with it in accordance with the statute, and that its order was made in accordance with the statute, and that so far from exceeding its powers it might have made a greater reduction, but it left the companies on the Atlantic seaboard business destined to Missouri points to charge one hundred per cent more than the same railroads voluntarily charge on transcontinental business, and, it is alleged, that it appeared from the testimony of one witness that the latter business yielded some profit, and by another witness testified, as an expert, that a rate fifty per cent higher would be "too large, of course."

The Commission alleges the reasonableness of the rates ordered by it, and that they are less than the companies charge and accept for transcontinental freight originating at the Atlantic seaboard and destined to Pacific coast terminals, the expense of service being no greater. A comparison is made also with Montana points and Spokane points, showing the rates to be less than to the Missouri River cities carried on the same railroads. So also to Oklahoma common points. So also for traffic originating at Pittsburg and carried through Chicago to Missouri River points, and at Chicago destined to Texas common points.

The reason given by the Commission for not disturbing the rates of the Eastern roads is that neither the complainant before it nor the companies charged that these rates were excessive, nor was a reduction of them sought, but, on the contrary, it was conceded that such rates were just and reasonable. The Eastern carriers were, therefore, dismissed from the proceedings.

The other allegations but give further details and illustrations of the foregoing.

An order was made allowing the Illinois Central Railway Company, the Atchison, Topeka and Santa Fe Railway Company, the Chicago and Alton Railroad Company, the Missouri Pacific Railway Company, the Missouri, Kansas and Texas Railway Company, and the St. Louis and San Francisco Railroad Company to file petitions of intervention. The allegations of these petitions are substantially the same as those of the bill. The answer filed by the Interstate Commerce Commission to the bill was taken as filed to the intervening petition.

Leave to intervene was also given to certain business houses of Milwaukee, St. Louis, Chicago, Detroit and Cleveland. Their petition set forth with some detail the discrimination, as it was alleged, that would be worked against them in favor of merchants at the Atlantic seaboard and Missouri River cities by the order

of the Commission, and also the disturbance of the commercial conditions which would result from the order. The Burnham, Hanna, Munger Dry Goods Company, one of the complainants before the Commission, and a number of other corporations and copartnerships, were allowed to file petitions in intervention. The petitions defended the order of the Commission, and again asserted that the rates between the Mississippi and the Missouri Rivers were unreasonable.

Evidence was taken and the court made the temporary injunction permanent.

The court carried into and made the foundation of its opinion the conception it had formed and expressed upon granting the preliminary injunction, that is, that the purpose of the Commission was not so much the reduction of unreasonable rates as protection of the Missouri River cities against competition. The court said: "Indeed, the contest in its larger aspect is a contest not so much between the shippers and the railroads as between the commercial and manufacturing interests of the Missouri River cities and of the Atlantic seaboard on the one part (their interests being identical) and the commercial and manufacturing interests of what is known as the Central Traffic territory (the territory west of Buffalo, Pittsburg and Parkersburg, and east of the Mississippi River) on the other part."

To support this view it was said that the differential of 9 cents on merchandise from the Atlantic seaboard to the Missouri River cities, whatever be the principle upon which the order was based will be "to protect to a certain degree the Denver jobbers and manufacturers within a given zone of territory against the jobbers and manufacturers in the Central Traffic Association territory . . . as also to open up to the Atlantic seaboard," in its trade with the Missouri River, "zones of territory, the advantages contained in the differentials against the competition of both the intervening Central Traffic Association territory and the Missouri River territory." And this, it was asserted, was the exercise of a "power artificially to apportion out the country into zones tributary to given trade centers, to be predetermined by the Commission, and non-tributary to others." This, it was further said, was a "power essentially different in principle from the mere power of naming rates that are reasonable."

We make these quotations from the opinion of the court because they put, in a clear and condensed way, the ultimate contention of the companies and the evil, as they see it, in the order of the

Commission, and which is intended to be exhibited by their voluminous pleadings and arguments. And such, it is insisted, was the conscious purpose of the Commission, a view in which the Circuit Court concurred, deducing it from certain avowals of the Commission in its report.

Such purpose and the want of power in the Commission to execute it is the foundation of the court's opinion. No analysis of the facts were made which concerned any other proposition or issue. The question involved, the court said, was not one of fact, but one of power; it is not whether, by the application of correct principles, a given rate had been decided to be unreasonable, but whether the principles applied are those within the power of the Commission. If this be so, we may wonder at the voluminous pleadings and the equally voluminous evidence. The elements of it were on the face of the report of the Commission. The court certainly thought it could be discerned on the face of the pleadings when passing on the motion for preliminary injunction. This question then we must regard as paramount and to it we will address ourselves. It may be that no other question is necessary to be decided. What the court would have done, with all other questions, we are not able to say. It took occasion to remark:

"It must be understood, however, that these orders of the Commission are enjoined solely because, in our judgment, they lay upon the commerce and manufacturing of the localities affected an artificial hand that Congress never intended should be put forth, and therefore are outside the power conferred on the Commission by Congress; for with the question of a reduction in rates, or a readjustment of rates, from which such artificial results have been eliminated, we are not now dealing."

A member of the court dissented from its judgment, and declared the grievance that the companies asserted against the order of the Commission was not sustained by the evidence.

It is true that the Interstate Commerce Commission by its order exercised a power "artificially to apportion out the country into zones tributary to given trade centers," and intentionally exercised it to protect the Missouri River cities against the competition of other cities? If that be the necessary conclusion the judgment of the Circuit Court it may be contended was right. Such conclusion we should certainly be reluctant to adopt. From whatever standpoint the powers of the Interstate Commerce Commission may be viewed, they touch many interests, they may have great consequences. They are expected to be exercised

in the coldest neutrality. The Commission was instituted to prevent discrimination between persons and places. It would indeed be an abuse of its powers to exercise them so as to cause either. And the training that is required, the comprehensive knowledge which is possessed, guards or tends to guard against the accidental abuse of its powers, or, if such abuse occur, to correct it. The possession of such advantages is one of its defenses. It alleges that by § 12 of the Interstate Commerce Act it is given authority to inquire into the management of the business of all common carriers subject to the provisions of the act, and is required to keep itself informed as to the manner and method in which the same is conducted, and is "authorized and required to execute and enforce the provisions of the act." Other sections are more specific in grants of power. Rates may not only be investigated and be pronounced unjust or unreasonable or discriminatory but other rates may be prescribed. These, we repeat, are great powers and means of their proper exercise are conferred. Investigation may be conducted, and as the Commission says in its answer, "that to enable it to perform its duties such information as shows the operations and operating results of each railway is" required to be filed with it and the subject is under constant investigation.

The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interest of the whole country. If the problems which are presented to it therefore are complex and difficult, the means of solving them are as great and adequate as can be provided. And arguments which point out and assail the imperfection which may appear in the result, this court has taken occasion to characterize. "They assail," it was said, "the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in the performance of the administrative functions vested in it, and upon such assumption invoke the exercise of an unwarranted judicial power to correct the assumed evils." *Interstate Commerce Commission v. Illinois Central Railway Company*, 215 U. S. 452, 478. It was, of course, recognized in that case that there must be power in the Commission to make the order which might be subject to attack, but want of power was distinguished from the mere expediency or wisdom

of making it, which, it was declared, was not open to judicial review.

We return therefore to the question of the power of the Commission and its purpose. The complainant before that body presented two issues, the effect of the rates from the Atlantic seaboard as discriminating against the Missouri River cities in favor of St. Paul and Minneapolis, and their unreasonableness of and in themselves. The first we may immediately put out of view. It was decided adversely to the complainants before the Commission, and we may say at the outset that the contention of the railroad companies that it was the only issue presented to the Commission is not justified.

The second issue was decided in favor of the complainants, the Commission finding that the through rates were unreasonable of and in themselves, and was caused by the charge from the Mississippi River crossings to the Missouri River cities. The grounds of its decision and principles upon which it proceeded the Commission set forth in its report, and to some extent all of the factors upon which the decision is based and supported. Indeed, the pleadings in the case and the argument of counsel are but fuller explanations of the elements set out in the report. The controversy, therefore, is not so much as to what these factors are as what they establish as to the power of the Commission to make the order. The effect of the order, it is contended as we have seen, is to create artificial zones tributary to certain trade centers, or, as it is expressed by the railroad companies, the effect of the order is to destroy the system of rates which has existed ever since the railroads were constructed and to "overturn the equality of opportunity in competition" which certain commercial centers possessed under that system and to substitute an artificial system, the feature of which is special advantages in rates to special sections. And it is said the order was entered for such purpose. The appellee intervenors, who are merchants and jobbers of the territory known as the Central Freight Association territory, attack the order on the ground (a) that it violates § 2 of the Interstate Commerce Act, in that it compels a charge to them for like kind of traffic under substantially similar circumstances and conditions greater than is charged to their competitors in seaboard territory and on the Missouri River; (b) the order is in contravention of § 3, in that it gives an unreasonable preference to merchants and jobbers in the seaboard territory and on the Missouri River over merchants and jobbers in Central Freight

Association territory; (c) that it arbitrarily attempts to change existing commercial conditions upon which the various distributing centers of the seaboard, Middle West and West have become established; (d) the power of the Commission is limited to the reduction of unreasonable rates, and that the rates reduced are not shown to be such in themselves; (e) the order is void, it being an attempt at legislation on the subject of general adjustment of rates.

These contentions present the full offending of the order, and the summary of them is that rates long established have been changed, commercial conditions are disturbed, and equal opportunities of competition of certain commercial centers which have grown up have been taken away, and undue protection given to others. This seems very formidable in the recitation. But it is met by counter charges of discrimination, and that the equal opportunities of competition contended for is a power which has grown up and is supported by the existence of unjust freight rates. It is certain that the subject has taken on more complexity than it had before the Interstate Commerce Commission, and the Commission has made this the basis of a motion to dismiss the suit as to the intervening railroads, and all the intervening merchants and manufacturers, on the ground as to the railroads, among others, that the order does not run against or operate upon them, and that no right of theirs can be determined by the decree. On the ground as to the intervenors, that over the matters herein the courts exercise only the jurisdiction conferred by the act to regulate commerce, and not general equity powers, and that the matter to be determined is not the respective rights of shippers or localities, but the validity of the order of the Commission, and the intervenors have a complete remedy by application to the Commission. And we may say here, as adding to the complex effect and interest of the questions presented, that the chambers of commerce and boards of trade of certain Eastern cities have presented a brief in defense of the order, asserting a vital interest in its preservation, and exhibiting and illustrating the discrimination which, as they contend, exists against them by the breaking of rates at the Mississippi River crossings.

Let us see, therefore, upon what grounds the Commission proceeded. The Commission is accused by the railroad companies of attempting to substitute an artificial system of ratemaking for a long-established system, and to protect or foster particular localities of production and distribution. Certain remarks of the

Commission are cited to support the charge. We think the charge puts out of view all else that was said by the Commission, puts out of view the comprehensive consideration the Commission took as exhibited in the explicit declaration made after quoting the local class rates between the rivers in cents per hundred pounds, that "these are the rates that are added to the rates up to the Mississippi River crossings to make up the through rates from the Atlantic seaboard to the Missouri River cities. Are these rates, as so used, and the through rates resulting therefrom, unwarrantably high or unduly discriminatory or unjustly prejudicial? Can they be changed without doing injustice elsewhere?"

We think the charge also puts out of view the disclaimers of such purpose in the answer of the Commission in its report to Congress, and its insistence that it is constrained by the law to act only on complaint to it and that it is open at all times to be appealed to to redress the grievances any shipper or locality may have. Nor did the Commission ignore or underestimate the manner in which the lines of railroads had been extended or the system of rates or ratemaking which had resulted. That is the system of making rates upon certain basing lines or points. Rates "break" at such points, it was proved as a result of building independent lines westward. In other words, lines of railroads were built to certain cities from the East, seeking such cities, it may be, because of their natural situation and facilities, and other independent lines building westward, each line fixing its own rates or uniting according to circumstances in joint rates. It is the observance of such points that give and maintain, as we understand the contention of the railroads, to certain cities "the equal opportunity in the distribution of merchandise with the merchants in the East, and with the merchants to the West of said cities, so far as their business is affected by trade rates." That this was carefully considered is manifest, for the Commission resisted the argument which was made against basing rates on such points, saying:

"We are not impressed with the view that the system of making rates on certain basing lines should be abolished. No system of ratemaking has been suggested as a substitute for it, except one based upon the postage stamp theory, or one based strictly upon mileage. Either of these would create revolution in transportation affairs and chaos in commercial affairs that have been built upon the system of rate making now in effect. It must now, how-

ever, be assumed that a basing line for rates may be established and be made an impassable barrier for through rates, or that cities or markets located at or upon such basing line have any inviolable possession of, or hold upon, the right to distribute traffic in or from the territory lying beyond. Development of natural resources, increase in population, growth of manufacturing or producing facilities, and increased traffic on railroads create changed conditions which may warrant changes in rates and in rate adjustments in order to afford just and reasonable opportunity for interchange of traffic between points of production and points of large consumption."

It was the sense of the Commission, however, that such points could not be immovable forever and fixed forever against power of changing, or that through rates based on such points must be exempt from regulation, no matter what their character, or be constituted at the will of the railroad of the sum of local rates or the sum of rates from one basing point to another, however unjust the rates might be. Indeed, as pointed out in the brief of the appellants in No. 664, the railway companies adhere to no such construction of rates. As there said, "the Pacific coast terminal rates, the Washington and Spokane common point rates, the Oklahoma rates and the El Paso and Texas common point rates are each and all a departure therefrom, and all are much less than the rates ordered by the Commission."

As we have said, the Commission is the tribunal that is intrusted with the execution of the interstate commerce laws, and has been given very comprehensive powers in the investigation of and determination of the proportion which the rates charged shall bear to the service rendered, and this power exists, whether the system of rates be old or new. If old, interests will have probably become attached to them and, it may be, will be disturbed or disordered if they be changed. Such circumstance is, of course, proper to be considered and constitutes an element in the problem of regulation, but it does not take jurisdiction away to entertain and attempt to resolve the problem. And it may be that there cannot be an accommodation of all interests in one proceeding. This the Commission has realized and expressed. The Commission, meeting a possible suggestion that if the part of the through haul, which consisted of the rate between the rivers, was too high, all rates between the rivers might be too high, said:

"If the local class rates of defendants between the Mississippi and Missouri Rivers were reduced, it would give the same degree

of advantage to all the producing and distributing centers on and east of the Missouri River, and their relative advantages or disadvantages would not be changed, while a very serious inroad upon the revenues of the carriers would inevitably result, and at a time of industrial depression when it could not well be borne. Such a change would necessitate corresponding changes in the rates to and from intermediate points, and would probably be reflected in changes in commodity rates as well. The local class rates between the rivers are high, but this is not the time to precipitate such a violent change as would follow an important reduction of them. The first class rate from Buffalo to Chicago, about 540 miles, and from Pittsburg to Chicago, about 465 miles, is 45 cents. From Cincinnati to Chicago, 306 miles, it is 40 cents."

We may say in passing that the passage thus quoted is one of those which is adduced to support the contention that the Commission's purpose was to introduce a new system of ratemaking and build up certain distributing centers. We do not think so. It only shows that the accusation that all rates between the rivers were too high might be justified, but that it would be unjust to the carriers to reduce them at that time. It is somewhat strange that that which was done in the interest of the carriers should be brought forward by them to attack the action of the Commission. It is very clear that by a voluntary reduction by them of such rates the equality of opportunity dependent upon them would be restored. We make this observation to bring out clearly the relation of the railroad companies to the grievance complained of. That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark v. Kansas*, 176 U. S. 114, 118; *Smiley v. Kansas*, 196 U. S. 447.

But, it may be said, such limitations upon the companies is not of consequence, for shippers and trade centers are here with complaints. It is doubtful if they are properly here, or rather were properly permitted to intervene. We have said that the act to regulate commerce was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so, whether persons or places be sufferers. *T. & P. Railway Co. v. Abilene Oil Co.*, 204 U. S. 426. We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review and is

confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made. *Interstate Commerce Commission v. Illinois Central R. R. Co.*, *supra*.

The order of the Commission besides is strictly limited. It was intended to determine nothing, and it determines nothing but that the through rates on Atlantic seaboard shipments to the Missouri River cities are too high. That order is alone open to review. Whether other persons, cities or areas of territory have grounds of complaint, the way is open by application to the Commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the Commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited.

One question remains for discussion, the finding of the Commission upon the character of the rate, whether it is unreasonable as decided. Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, "due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central Railroad Company v. Interstate Commerce Commission*, 206 U. S. 454, and cases cited. The testimony in this case does not shake the strength of such presumptions. We have seen that the Circuit Court refrained from expressing an opinion upon anything but the power of the Commission. Circuit Judge Baker, dissenting from that view, went further and said:

"The complainants are common carriers whose rates on certain traffic are directed to be reduced by the order complained of. Two grounds for injunction are alleged. One is that the new rates are confiscatory. There is no proof whatever that the rates which the Commission prescribed as just and reasonable are not sufficient to pay the cost of handling that traffic, to cover that traffic's full proportion of maintenance and overhead expenses, and to return to the carriers an ample net profit. Furthermore, proof is lacking that, if the carriers should reduce other rates to correct what they claim is the maladjustment caused by the Commission's order, the reduction would not leave them abundant net returns. For the purpose of this hearing, therefore, it must stand

as an agreed fact that the present reduction is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation."

We concur in these conclusions.

Decree reversed and the case remanded with directions to dismiss the bill and all proceedings in the Circuit Court.

MR. JUSTICE WHITE dissenting.

The court below enjoined the execution of the order of the Commission because it was of the opinion that that body had exceeded the powers conferred upon it by the act to regulate commerce, since it had based its order upon the assumption that it was its duty under the act to secure a relatively equal share of the volume of interstate commerce to communities and places, and therefore that it was its province to alter otherwise legal rates for the purpose of correcting the inequalities which otherwise would arise from the competitive rivalry between sections and places. As, in my opinion, the court below was correct in the view which it took of the order of the Commission, and was right in holding that the power which the order manifested was not conferred by law, I dissent from the judgment of reversal now announced. It does not, however, seem to me necessary that I should do more than state the fact of my dissent for the following reasons: The judgment of reversal is based, not upon the ruling that the Commission possessed the authority to make the order if it was based upon the assertion of power upon which the court below found the order must necessarily rest, but exclusively upon the theory that the court below, while rightly holding that the Commission had not the power which it assumed that body had exerted in making the order, had nevertheless mistakenly enjoined the order because it did not exert, or attempt to exert, the power which the court conceived had been called into play in making it. In other words, although the opinion now announced excludes the authority which the lower court deemed the Commission had exerted by the order in question, it nevertheless maintains the order because of the conclusion that the order was but an exertion by the Commission of its authority on complaint that a rate was unreasonable of itself, to correct such rate by substituting a reasonable rate therefor. Although I am unable to agree with the reasoning by which the court now gives to the order of the Commission the narrow basis thus stated, as the solution of that

question depends upon the idiosyncrasies of this particular case and involves no principle of general importance, it seems to me I am called upon to do no more than simply to state my inability to agree.

MR. JUSTICE HOLMES and MR. JUSTICE LURTON join in this dissent.

UNITED STATES OF AMERICA v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

235 U. S. 314 (1914).

The facts are stated in the opinion.

Mr. Solicitor General Bullitt for the United States.

Mr. Charles W. Needham for the Interstate Commerce Commission.

Mr. William A. Wimbish for Duncan & Co., *et al.*

Mr. Albert S. Brandeis, with whom *Mr. Henry L. Stone* was on the brief, for Louisville & Nashville Railroad Co.

Mr. K. T. McConnico, with whom *Mr. John A. Pitts* and *Mr. Lee Douglas* were on the brief, for the Nashville Grain Exchange and the Nashville Board of Trade.

Mr. Merrel P. Callaway and *Mr. R. Walton Moore* filed a brief for the Nashville, Chattanooga & St. Louis Railway.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case involves a controversy as to the legality of a reshipping privilege permitted at Nashville by the carriers who are parties to the record, described by the court below as follows:

"On grain, grain products, and hay shipped to Nashville by rail from or through Ohio or Mississippi River crossing points such as Louisville, Evansville, Hickman, Paducah, Cairo, etc., the L. & N. and N. C. & St. L. charge the full local freight rate from said crossing points to Nashville. These shipments may then be stopped at Nashville for a period not exceeding six months, during which time they may be rebilled or reshipped to destinations in southeastern and Carolina territory; and on such reshipments so rebilled the freight charges into and out of Nashville are readjusted so that the total transportation charge on any one

shipment from any given Ohio or Mississippi River crossing, via Nashville, to any given destination in said territory, shall exactly correspond with the transportation charge legally assessable on that shipment had it been billed and moved through from its point of origin at the said Ohio or Mississippi River crossing points to its final destination without having been stopped in transit at Nashville."

We adopt the history of the litigation in so far as it relates to the privilege in question contained in the brief on the part of the United States.

"1. In 1908 certain Georgia grain dealers complained to the Interstate Commerce Commission of various traffic practices at Nashville; after taking voluminous proof, the Commission, on June 24, 1909, held the reshipping privilege illegal and ordered it stopped. (16 I. C. C. 590, 595.)

"2. The Commission, on its own motion, postponed the effective date of the order, so that it might institute a country-wide investigation of the practices involved; and on May 3, 1910, the Commission, after a hearing at which about 150 shippers and carriers were represented by counsel, reported that its former order abolishing the reshipping privilege *in toto* was too strict, and remitted the matter to the carriers and shippers to frame regulations that would prevent any rebating under the privilege (18 I. C. C. 280) and, pursuant thereto, new and satisfactory regulations were adopted to safeguard the reshipping privilege (21 I. C. C. 183, 188).

The previous order of June 24, 1909, which had abolished the reshipping privilege at Nashville was vacated and the Commission thereafter again considered the controversy between the grain dealers of Georgia and the Nashville dealers and carriers.

"3. . . . On June 9, 1911, the Commission delivered a Supplemental Report, holding that the action of the carriers in granting the reshipping privilege to Nashville, while refusing it to Atlanta, etc., was an undue and unreasonable preference to Nashville, in violation of section 3 of the Interstate Commerce Act. (21 I. C. C. 186.) The Commission entered an order in accordance therewith.

"4. The Nashville Board of Trade, the L. & N. R. R. Co., and the N. C. & St. L. R. R. Co. thereupon sued in the Commerce Court to enjoin the enforcement of the order; the two suits were consolidated." The record evidence before the Commission was introduced and some additional testimony was taken.

The Commerce Court, finding that there was no conflicting or

disputed evidence concerning the origin and character of the re-shipping privilege, concluded that whether such privilege was an undue preference was not a matter of fact but a question of law upon which it was its duty to reach an independent conclusion. The court, therefore, among other considerations because the privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. A peremptory injunction was allowed restraining the enforcement of the order of the Commission. And the correctness of this action is the question here for decision.

In view of the doctrine announced in *Interstate Com. Com. v. Illinois Cent. R. R.*, 215 U. S. 254; *Interstate Com. Com. v. Delaware, L. & W. R. Co.*, 220 U. S. 235; *Interstate Com. Com. v. Louisville & Nashville R. R.*, 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *East Tenn. &c. Ry. Co. v. Interstate Com. Com.*, 181 U. S. 1, 23-29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the *Illinois Central* and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

While these conclusions demonstrate the error in the action of the court below, that result does not authorize us to reverse and give effect to the order of the Commission without going further, since it must be determined whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possessed, or, what is equivalent thereto, was wholly unsustained by proof, — questions which the court below failed

to pass upon because of the erroneous conception in which it indulged concerning its own powers. But if it were essential for us to consider these questions we should be confronted with a grave situation arising from the serious doubt which would exist whether it would be possible for us to do so in view of the manner in which the Commission had discharged its functions, and whether that method had not in and of itself amounted to a denial of a hearing and thus resulted in want of due process of law. See *Inter-State Com. Com. v. Louisville & Nashville R. R.*, *supra*, at p. 91, and the paragraph from the answer of the Commission filed in the court below which is in the margin.¹

We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege, since we are of the opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute and was therefore not a preference, the right to continue it had been expressly prohibited by statute until on application made to the Commis-

¹ "That in said investigation and in arriving at its decision therein this respondent, as in duty bound under the law, weighed and considered all the facts and arguments presented by the petitioners herein, by other carriers, and all other parties to said proceeding; that in forming its opinion and arriving at its conclusions this respondent, exercising its administrative functions and powers, considered all pertinent facts and matters set forth in many reports and statistics on file with said respondent, together with other facts coming to the knowledge of this respondent in the performance of its duties and functions prescribed and set forth in the act to regulate commerce and the amendments thereto pertaining to the privileges of rebilling and reshipping; that from said reports and tariffs it appears that said rebilling and reshipping privileges exist at many interior points where no water competition obtains; it is therefore not competent, nor is it relevant, for said petitioners to allege that any particular fact or facts before this respondent in said proceeding were contradicted or conclusive in favor of the petitioners' contention: nor can the petitioners by judicial proceedings ascertain each and all the facts, circumstances, and conditions in regard to said transportation that were necessarily and properly considered by and which aided this respondent in arriving at its conclusion that said practice of rebilling and reshipping said products from Nashville was unduly and unreasonably discriminatory.

"This respondent denies that there is, or can be, under the law, any complete record of all the evidence, facts, and circumstances before the Commission in determining that this, or any other practice by carriers, is unduly and unjustly discriminatory as between localities or persons, and respondent is advised and so alleges that the determination of said question, as to whether said admitted discrimination is undue and contrary to the provisions of said act to regulate commerce, is one wholly and exclusively within the jurisdiction of this respondent."

sion its consent to that end was given. The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of § 4 of the Act to Regulate Commerce and the right to make a rate accordingly to continue in force until on complaint it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to § 4 by the act of June 18, 1910, c. 309, 36 Stat. 539, 547. This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a longer distance, was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibitions efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases*, 234 U. S. 476. If then it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form and looking at the substance of things, was when originally established, an exertion of the authority conferred or recognized by § 4 of the act, as there is no pretense that permission for its continuance had been applied for as required by the amendment and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below. To determine whether § 4 is applicable requires a very brief consideration of the uncontroverted situation from which the rebilling privilege arose and upon the existence of which it depended. It is undoubted that for many years the Ohio River was a basing point for rates, and traffic moving from the producing regions of the northwest to the consuming regions in the southeast bore rates from Ohio River points to destination which because of competition were lower from Ohio River points to the farther points of consumption than were charged from intermediate (nearer) points between the Ohio River and such points of consumption. This lesser charge for the longer than for the shorter distance as to the traffic in question was typically illustrative of the condition contemplated by § 4 of the Act to Regulate Commerce. As to

Nashville, however, this idiosyncrasy arose: The carriers from the Ohio River to Nashville instead of giving the lesser rate for the longer distance from the Ohio River to Nashville than was asked for intermediate points, maintained a local and proportionate rate for grain and other northwestern products from the Ohio River to Nashville, although giving a lower rate for the longer haul from the Ohio River to points in the south or southeast territory beyond Nashville. Upon the basis, however, that there was water competition between the Ohio River and Nashville if not for other reasons, as to which we think it is not relevant to inquire, there was granted by the carriers to shippers of grain at Nashville the rebilling privilege which we have at the outset described. That is to say, shippers of grain at Nashville on establishing the receipt at Nashville of grain from Ohio River points equal in quantity to grain proposed to be shipped, received an allowance on the local rate from Nashville to the point of destination which made the rate on the shipment equivalent to what it would have been had the grain originally moved from the Ohio River point to its ultimate point of destination and not stopped at Nashville at all. We quote a clear illustration of the operation of the privilege taken from the argument at bar of one of the carriers:

"For example, the local rate on grain from Evansville, on the Ohio River, to Nashville, is 10 cents per 100 pounds, and the local rate from Nashville to Atlanta is 17 cents per 100 pounds. The joint rate from Evansville to Atlanta is 24 cents per 100 pounds, or 3 cents less than the sum of the locals. Under the reshipping practice the joint rate of 24 cents is protected when the shipment has been stopped in transit at Nashville. The local rate of 10 cents from Evansville to Nashville having been paid at the time of the shipment into Nashville, an adjustment of the total transportation charge is made when the reshipment to Atlanta occurs, so that the shipper in the end pays upon the shipment the joint rate instead of the combination of local rates into and out of Nashville."

When the result of this allowance is understood there seems to be no room for serious controversy that the right to continue the privilege is controlled by § 4 of the act. The actual shipment from Nashville must either be considered as a movement from Nashville, irrespective of the rate which would have been applicable on a through shipment from an Ohio River point to the same point of destination, or it must be treated by a fiction as

one moving from an Ohio River point to the same destination. If the first, then clearly the allowance made of a rate from Nashville to the point of destination was a lesser charge for the longer distance hauled as to such grain than was charged for the shorter distance as to any other grain moving from Nashville to intermediate points or from such points to places further on and came clearly within the grasp of § 4. If on the other hand it be imagined to be a shipment from the Ohio River crossing to the point of destination upon the theory that the traffic before stoppage at Nashville originated at the Ohio River point, then exactly the same conditions would be reproduced, since the charge as the result of the reduction made was the equivalent of a lesser rate for the longer than for the shorter distance, which, as we have stated, was the prevailing system from Ohio River crossings to points of destination in the southeast.

It is true that in argument it was said that the question here is whether there was a preference or discrimination under §§ 2 and 3 of the act and not an inquiry under § 4 and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of §§ 2, 3, and 4 of the act being in *pari materia* required harmonious construction and therefore they should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permitted by § 4 could not for such reason be held to be either a preference or discrimination under §§ 2 or 3. *Louisville & Nashville R. R. v. Behlmer*, 175 U. S. 648; *East Tenn. &c. Ry. v. Interstate Com. Com.*, 181 U. S. 1. But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction and indeed is in direct conflict with all three of the sections, — a result clearly arising in the case before us in consequence of the amendment of § 4. Indeed when the evil which it may be assumed conduced to the adoption of the amendment of § 4 and the remedy which that amendment was intended to make effective are taken into view (see *Intermountain Rate Cases*, *supra*), it would seem that the case before us cogently demonstrates the applicability of the amendment to the situation. And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things and not by names, for if that were not the case the provi-

sions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose.

It follows from what we have said that the court below was wrong in enjoining the order of the Commission and on the contrary should have dismissed the complaint. The case will therefore be appropriately remanded to enable a decree to that effect to be entered, without prejudice, however, to the right of the carriers to apply to the Commission to be relieved from the operation of the provisions of § 4 of the Interstate Commerce Act if they are so advised.

Reversed.

MR. JUSTICE PITNEY concurs in the result.

PROCTOR & GAMBLE COMPANY *v.* UNITED STATES
OF AMERICA, INTERSTATE COMMERCE COM-
MISSION, CINCINNATI, HAMILTON & DAYTON RAILWAY
COMPANY, *ET AL.*

225 U. S. 282 (1912).

The facts are stated in the opinion.

Mr. George H. Warrington for appellants.

Mr. Francis B. James, for appellants.

Mr. Assistant Attorney General Denison, with whom *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, was on the brief, for the United States.

Mr. P. J. Farrell for the Interstate Commerce Commission.

Mr. Edward Barton for the Cincinnati, Hamilton & Dayton Railway Company, appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Having three manufacturing plants, one at Ivorydale, Ohio, a second at Port Ivory, New York, and a third at Kansas City, Kansas, in which they carried on the business of refining cottonseed and other oils and of manufacturing soap and other products

from grease and oil, the Procter & Gamble Company, to facilitate the transportation to their factories of the substances required for their operation and of shipping out the finished products, became the owner of about five hundred railroad tank cars. The cars were exclusively devoted to the business of the company in the following manner: On the property of the company in the yards about their factories there were railroad tracks belonging to the company which served for holding empty or loaded cars, the cars thus situated being held for storage and for movement from place to place, as business required. At each of the factories there was also an interchange track connected with the tracks in the yards and with the tracks of the railroad company or companies through whom the business of shipping in interstate commerce to and from the factories was carried on. The movement of cars to the interchange tracks for outward shipment and from the interchange tracks when they were left there by railroad companies was at two of the factories carried on by the company through its own employes and motive power. At the other one this work was done by a railroad company, who made an independent and special charge for the service. The transportation of the private tank cars of the corporation by the railroad companies was governed by established rules, and the price paid to the railroads for transporting the commodities of the company in its private cars was the regular price fixed for such commodities in the established tariffs. The railroads, however, paid to the company for the use of its private cars a fixed sum per mile, this payment being also stated in the regular established tariffs in compliance with law. A portion of the carrier's rule (Rule 29), relating to the subject of compensation for hauling such private tank cars is in the margin.¹

In 1910 among others the railroads engaged in transporting tank cars from the plants of the Procter & Gamble Company adopted a system of rules governing the payment of demurrage

¹ Rule 29. (Sec. 1.) In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are governed by this classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three-quarters ($\frac{3}{4}$) of one cent per mile will be allowed for the use of such tank cars, loaded or empty, provided the cars are properly equipped. No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

by shippers. The provisions of these rules pertinent to this case are excerpted in the margin.¹

The rules in question were prepared by a committee of the National Association of Railroad Commissioners composed of a representative from each State having a railroad commission and a member of the Interstate Commerce Commission, and were adopted in convention by the National Association and were subsequently approved by the Interstate Commerce Commission, although putting them in force was not imperatively prescribed by that body.

The Procter & Gamble Company, dissatisfied with the regulations concerning demurrage, in so far as they imposed in certain respects charges upon its tank cars, filed a complaint with the Interstate Commerce Commission charging the rules to be repugnant to the act to regulate commerce because unjust and oppressive and because to enforce them would create preferences and discriminations forbidden by the act. After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied. In February, 1911, the Procter &

¹ Rule I.

Cars subject to Rules.

Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

- (a) Cars loaded with live stock.
- (b) Empty cars placed for loading coal at mines or mine sidings, or coke at coke ovens.
- (c) Empty private cars stored on carrier's or private tracks, provided such cars have not been placed or tendered for loading on the order of a shipper.

NOTE. — Private cars while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership.

(Empty private cars are in railroad service from the time they are placed by the carriers for loading or tendered for loading on the orders of a shipper. Private cars under lading are in railroad service until the lading is removed and cars are regularly released. Cars which belong to an industry performing its own switching service are in railroad service from the time they are placed by the industry upon designated interchange tracks and thereby tendered to the carrier for movement. If such cars are subsequently returned empty, they are out of service when withdrawn by the industry from the interchange; if returned under load, railroad service is not at an end until the lading is duly removed.)

Gamble Company filed a petition in the Commerce Court of the United States making defendants the United States, the Interstate Commerce Commission and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin,¹ wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of . . . said demurrage rules."

The prayer was as follows:

"Wherefore, complainant prays that the aforesaid order of said Interstate Commerce Commission made in said cause No. 3208 on November 14, 1910, be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges

¹ Complainant avers that said order of said Interstate Commerce Commission, in dismissing its complaint as above set forth, is null and void and beyond the power of said Interstate Commerce Commission, in that it sustains the validity of Rule I of said demurrage; that said Rule I in so far as it provides that privately owned cars under lading on private tracks are in railroad service and subject to the demurrage charges imposed by said tariffs until the lading is removed, is unjust and unreasonable, in that it deprives complainant of the right to use its said private cars upon private tracks for its own purposes without paying the defendant railway companies demurrage charges therefor, after said private cars have been delivered to complainant and have actually ceased to be engaged in railroad service; that the charges exacted by the defendant railway companies of complainant under said provision of said rule permit said defendants to take complainant's property without compensation, and deprive it of its property without due process of law, in violation of the Constitution of the United States, and particularly of Article V in amendment thereof, and that said provision of said rule is in violation of the said Act to Regulate Commerce and particularly of §§ 1 and 15 thereof as amended June 29, 1906; that said defendants are now exacting such demurrage charges under the provisions of said rule, and will continue to do so, unless the said order of said Interstate Commerce Commission is set aside and annulled by this court, and defendant railway companies are enjoined from enforcing the provisions of said rule.

upon complainant's loaded tank cars after said cars have been delivered to complainant and placed upon tracks owned or controlled by it; and further, that said defendant railway companies and each of them be required to repay to complainant herein all sums found to have been wrongfully collected by them, or any of them, under the rule here complained of; and that complainant be granted such other and further relief as it may be entitled to in the premises."

The railroads answered the bill. The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss, upon this general ground: "Because the order of the Interstate Commerce Commission complained of directed no affirmative relief and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;" and upon the following more detailed specifications filed on behalf of the United States:

"(a) It prays that the order of the Interstate Commerce Commission be enjoined, when said order directed no action against any party and therefore the same is not subject either to enforcement or to injunction.

"(b) It prays that the defendant common carriers, who are not proper parties to this proceeding except on their own motion, be enjoined from collecting the demurrage mentioned, when no order inhibiting the same has been made by the Interstate Commerce Commission, and in the absence of such an order this court has no power to grant such relief.

"(c) It prays that the defendant common carriers be required to repay to complainant all sums heretofore wrongfully collected as demurrage, when this court has no power or jurisdiction to grant such relief, either with or without an order of the Interstate Commerce Commission directing such repayment."

The court, declining at the threshold to consider the demurrers and motion to dismiss, postponed their consideration until the hearing on the merits. There was a consent by all the defendants except the United States and the Interstate Commerce Commission that the case be heard upon the evidence and documents introduced before the Commission and the report of that body. The United States and the Interstate Commerce Commission, however, on the overruling of its demurrer and a refusal to grant its motion to dismiss, elected to stand thereon and declined to plead further.

In disposing of the case, the court considered it in a two-fold aspect — first, as to its jurisdiction; and, second, as to the merits of the case. On the first subject it held, *a*, that it had jurisdiction of the cause, and that the refusal of the Interstate Commerce Commission to afford relief to the Procter & Gamble Company was, for the purposes of jurisdiction of the court, the exact equivalent of an order of the Commission granting affirmative relief, and, *b*, as a corollary of this power it was further decided that there was jurisdiction to award pecuniary relief for demurrage if any was illegally exacted. On the merits, however, it was decided that the Interstate Commerce Commission had rightfully refused to grant relief and that there was no foundation for the contention that the property of the company in its private tank cars was taken without due process of law by the demurrage regulations. On this subject it was declared that as the company had accepted the provisions of the published tariffs concerning the use of the tank cars, therefore those cars were submitted to the regulations which the carriers had lawfully established. In other words, the court concluded that because the company had availed of the proffer of the railroads to use the cars in transportation and pay for their use a stated sum, the company had acquired no right to disregard restrictions against preferences and discriminations embodied in the act to regulate commerce.

The case was then brought here by the appeal of the Procter & Gamble Company. That company insists that the court below erred in not awarding the relief which was asked and in dismissing the petition. On the other hand the Interstate Commerce Commission and the railroads insist that the court was right in refusing relief and dismissing the bill. Before we can come, if at all, to consider the merits, however, it is necessary to dispose of the question concerning the jurisdiction of the court below to entertain the petition, because the United States insists at bar, as it did in the lower court, that the court erred in overruling the demurrer to the jurisdiction and refusing to dismiss the cause for want of jurisdiction.

The provisions of the act to establish the Commerce Court fixing the jurisdiction of that court are stated in the first section of the act of June 18, 1910, 36 Stat. 539, c. 309, now § 207 of the Judiciary Act of March 3, 1911, 36 Stat. 1087, 1148. And in view of the necessity of having the provisions of the section immediately in mind we reproduce them. They are as follows:

“SEC. 207. The Commerce Court shall have the jurisdiction

possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

"The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

The question to be decided is this: Does the authority with which the Commerce Court is clothed in virtue of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands? In other words, the important question is, Is the authority of the Commerce Court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally

interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness?

Turning for the elucidation of the question to the jurisdictional provisions, it is plain that although all of the four numbered subdivisions composing the section may serve to throw light upon the issue for decision the solution of the question must intrinsically be found in a correct interpretation of the second subdivision. We say this because clearly the first deals alone with cases for the enforcement of orders of the Commission as therein described; the third deals only with cases brought under the act of February 19, 1903, which is wholly foreign to the subject here reviewed, since the act referred to relates only to proceedings to enjoin either discriminations or departures by carriers from their published rates, and the fourth refers exclusively to the right to mandamus conformably to § 20 or 23 of the act to regulate commerce, which sections are concerned with the performance of certain duties imposed upon carriers by the act to regulate commerce. The words of this second subdivision are: "Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves. But if it be conceded for the sake of argument that the language of the provision is ambiguous a consideration of the context of the act will at once clarify the subject. Thus, the first subdivision provides for the enforcement of orders, that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission, and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph.

In other words, by the coöperation of the two paragraphs, authority is given on the one hand, to enforce compliance with the orders of the Commission if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208), provides that the mere pendency of a suit to enjoin, set aside, annul or suspend an order of the Commission "shall not stay or suspend the operation of such order" but confers upon the court the power, under circumstances stated, to restrain or suspend in whole or in part the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order sought to be enforced, essential to the granting of an order or injunction restraining or suspending its enforcement.

We might well be content to rest our conclusion upon the considerations just stated. In view, however, of the importance of the subject we do not do so, but shall consider the matter in a broader aspect for the purpose of demonstrating that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the court below of the power which it deemed it possessed would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action was contemplated. It cannot be disputed that the act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial

enforcement of the act to regulate commerce is certain. The act creating the Commerce Court (June 18, 1910, 36 Stat. 539, c. 309) was entitled "An Act to create a Commerce Court, and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes." The first six sections, which called into being the Commerce Court and defined its powers, all demonstrate the purpose as above stated, that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

What was then the existing system and the functions which the new court was created to perform will be conclusively shown by a brief outline of the scope and purpose of the system which arose from the enactment of the act to regulate commerce (Act February 4, 1887, c. 104, 24 Stat. 379) and its development. By that act as originally enacted many regulations and consequent duties were imposed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement the exercise of official functions of an administrative nature, and, second, for their harmonious development an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act (§ 11) created an administrative body endowed with what may be in some respects qualified as *quasi-judicial* attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. And for the purposes stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining, limited as to the subject-matters to which we have referred, whether the provisions of the act had been violated and if so of primarily enforcing the act by awarding appropriate relief. The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt coming within the scope of the administrative unity which we have mentioned primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated the act did not give to the courts power

to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints, when by previous submission to the Commission, they had been sanctioned by a command of that body.

In the long interval which intervened between 1887 when the act to regulate commerce was enacted and June 18, 1910, when the Commerce Court act was passed we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question without previous affirmative action by the Commission to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or non-compliance with the provisions of the act. The subject is illustrated and made clear by the rulings in *State of Washington, ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, 224 U. S. 510; *Robinson v. Balto. & Ohio R. R.*, 222 U. S. 506; *Southern Railway Co. v. Reid*, 222 U. S. 424, and *Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426. The latter case especially will serve to point out that where the power of original action by a court without previous action of the Commission was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was by the express terms of the act to regulate commerce not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission.

Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their

enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may be not technically doing so. *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 547; *Int. Com. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452. So also at the time the law creating the Commerce Court was passed, suits to compel obedience to orders of the Commission or to restrain an enforcement of such orders were required to be brought in the Circuit Court of the United States in the district where a carrier or one of two or more carriers to whom the order was directed had its principal operating office.

In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the Commerce Court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite action of the Commission, operate to create a vast body of rights which had no existence at the time the Commerce Court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the law-maker from the beginning to guard against, an interpretation which would seemingly create rights hitherto non-existent and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the

interpretation given by the court below to the act would necessarily amount to declaring that Congress in seeking to unify and perfect the administrative machinery of the act to regulate commerce and to make more beneficial its operation had overthrown the whole fabric of the system as previously existing.

The demonstration of the error of the construction adopted below is so additionally made manifest by a consideration of the general structure and the text of the act creating the Commerce Court, that in connection with the legislative history which we have previously stated, that we advert to that point of view:

A. The first section of the act wherein is recited the jurisdiction of the Commerce Court which we have previously commented upon makes clear that the purpose was not to create a court with new and strange powers destructive of the previous well-established administrative authority of the Interstate Commerce Commission and in conflict with the general jurisdiction vested in the courts of the United States, but only to give to the new court the special jurisdiction then possessed by the courts of the United States for the enforcement of orders made by the Commission, and thus to unify the exertion of judicial power with reference to the enforcement of the orders of the Commission. The opening words of the section which make this result clear are as follows: It (the Commerce Court) shall "have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds: . . ."

B. Because the enumeration as to the subject-matters of jurisdiction conferred which follows the words just quoted, which enumeration we have previously reproduced and commented upon, conforms to the existing law and evidently assumes its continued operation.

C. Because the sedulous effort of Congress while creating the new machinery not to destroy the existing system finds expression in a two-fold way: (1) by the declaration that nothing in the fact that the existing power of the Circuit Courts as to the subjects of jurisdiction transferred to the new court should be deemed as an enlarging of those powers, and (2) by the provision that nothing in the transfer of the enumerated powers to the Commerce Court should be considered as limiting or abridging the existing jurisdiction possessed by the Circuit Courts as to things and subject-matters not embraced in the powers transferred. Thus the two provisos again serving to make clear the legislative intent that the creation of a new body to exercise a portion of the existing judicial power should not in any

way enlarge the power as existing or be implied as destroying or minimizing the general scope of the judicial power possessed by the Circuit Courts where such power was not embraced within the authority transferred to the new body. D. Because the act which created the court contained in its latter sections provisions amending sections of the act to regulate commerce which when rightly interpreted were manifestly adopted to make that act more consistent with the new situation resulting from the creation of the new court and utterly inconsistent with the conception that that court had power not previously possessed by any court and the existence of which would serve to set at naught the whole system of interstate commerce regulation.

Some suggestion is made in argument concerning the alleged claim of constitutional right asserted in the petition filed below and which the court disposed of in the manner we have stated. But what we have said suffices to point out the fallacy which the contention involves, for the following reasons: If the claim of constitutional rights concerned a subject which from its very nature and effect dominated the act to regulate commerce and therefore was wholly independent of all questions of right or remedy created by or depending upon that statute, then the issue presented a controversy not cognizable in the Commerce Court, as it could not so be without violating the express reservation and restriction as to the general power of the Circuit Courts which we have just quoted. If, on the other hand, the constitutional question was involved in or depended upon the provisions of the act to regulate commerce that question in the nature of things was subject to the precedent action of the Commission on the subjects committed to it by the act to regulate commerce and as to which the court had jurisdiction alone to act in virtue of a prior affirmative order of the Commission.

The general considerations which we have stated establish the error committed by the court below in holding that it had jurisdiction over the claim of the Procter & Gamble Company to recover on a money demand based on the illegality of the demurrage charges alleged to have been wrongfully exacted by the railroad companies. Through abundance of precaution, we, however, say that wholly irrespective of the general considerations stated we think the conclusion of the court as to its possession of jurisdiction over the subject referred to was clearly repugnant in other respects to the express terms of the act.

As it follows from what we have said that the court below

erred in taking jurisdiction of the petition, it results that our duty is to remand the cause to the court below with directions to dismiss the petition for want of jurisdiction,

And it is so ordered.

3. PROCEEDINGS FOR ENFORCEMENT

INTERSTATE COMMERCE COMMISSION *v.* BAIRD.

194 U. S. 25 (1904).

THIS is an appeal from an order made in the Circuit Court of the United States for the Southern District of New York in the matter of the petition of the Interstate Commerce Commission for orders requiring the testimony of witnesses and the production of certain books, papers and documents. The petition recites that the Attorney General of the United States, at the request of the Interstate Commerce Commission, instructed the United States District Attorney for the Southern District of New York to present the petition and institute proper proceedings for the enforcement of the provisions of the acts to regulate interstate commerce as amended, and to invoke the aid of the court in requiring the attendance and testimony of witnesses and the production of books, papers and documents, pursuant to the provisions of said acts. The case grows out of a complaint of William Randolph Hearst, filed on November 2, 1902, with the Interstate Commerce Commission, against the Philadelphia and Reading Railway Company, Lehigh Valley Railroad Company, Delaware, Lackawanna and Western Railroad, Central Railroad Company of New Jersey, New York, Susquehanna and Western Railroad Company, Erie Railroad Company, New York, Ontario and Western Railroad Company, Delaware and Hudson Company, Pennsylvania Railroad Company and Baltimore and Ohio Railroad Company.

In the complaint it was charged: That the defendants are common carriers, engaged in the transportation of passengers and freight between points in different States of the United States, and are particularly engaged in the transportation of anthracite and bituminous coal mined in Pennsylvania, Maryland and West Virginia, and shipped as interstate traffic over said lines, and are

carriers subject to the provision of the act of February 4, 1887, to regulate commerce, and the acts amendatory thereto; that the rates charged and exacted by the defendants for the transportation of anthracite coal in carloads from points in the anthracite coal region of Pennsylvania to New York city and New York harbor points and internal points of destination in the State of New York, to Boston and other points in the New England States, to Baltimore and other points in the State of Maryland, and to Washington, in the District of Columbia, are unreasonable and unjust, and subject consumers and producers of such coal, who are not common carriers or corporations owned and controlled by common carriers, to undue and unreasonable prejudice and disadvantage in favor of and to the undue and unreasonable preference and advantage of said defendants and companies under their control, in violation of sections 1 and 3 of the act to regulate commerce; that the rates charged and exacted by the defendants for the transportation of anthracite coal are relatively unreasonable and unjust, and unjustly discriminating against the interests of dealers and consumers of that commodity as compared with the rates contemporaneously charged by said defendants for transportation of bituminous coal for much longer distances and to the points of destination above mentioned, and also as compared with the defendants' rates and charges on other carload freight generally, all of which is a violation of §§ 1, 2 and 3 of the act to regulate commerce; that the defendant companies — Lehigh Valley Railroad Company, Central Railroad Company of New Jersey, Delaware, Lackawanna and Western Railroad Company, New York, Susquehanna and Western Railroad Company and the Philadelphia and Reading Railway Company — are, in the absence of agreement, natural competitors in the business of transporting anthracite coal from the coal fields of Pennsylvania to tide-water at New York, two of said defendants — the Lehigh Valley Railroad Company and the Central Railroad Company of New Jersey — being substantially parallel lines; that in 1896, 1897, 1898, 1899, 1900 and 1901 the six defendants last named, by an agreement and combination with one another, pooled and have during the year 1902 pooled freights and freight traffic in anthracite coal, so as to divide the same between their different lines in agreed proportions, in violation of § 5 of the act to regulate commerce. The prayer of the petition was that the defendants be required to make answer to the charges, and, after hearing, for an order or orders commanding the said defendants, and each of

them, wholly to cease and desist from each and every of the alleged violations of the act to regulate commerce, and for such further order or orders and action by the commission as its duty under the act and the cause of petitioner and others similarly situated may require. Answers were filed by the railroad companies, taking issue with the allegations of the petition and denying violation of the law. In the course of the hearing certain witnesses refused to produce contracts and answer questions when required so to do by order of the commission, which refusal gave rise to the petition to the Circuit Court. The character of the testimony required by the order of the commission is sufficiently set forth in the opinion hereinafter given. To the petition answers were filed too lengthy to abstract, and in substance setting forth the right of the defendants to refuse the production of the papers and documents and to decline to answer the questions because the same did not relate to any subject which the commission had the right to investigate and the contracts relate to the private business of persons not parties to the proceedings before the commission; that the witnesses are protected in their right to refuse to produce the contracts or answer the questions by the Fourth, Fifth and Tenth Amendments to the Constitution of the United States; that the contracts were not relevant to the subject matter of investigation before the commission. The Circuit Court placed its decision on the latter ground, and dismissed the petition of the Interstate Commerce Commission.

Mr. William A. Day, assistant to the Attorney General, and *Mr. John G. Carlisle* for appellant.

Mr. John G. Johnson, with whom *Mr. Francis I. Gowen* and *Mr. F. H. Janner* were on the brief, for appellees Thomas and Baird.

Mr. Adelbert Moot, with whom *Mr. George F. Brownell* was on the brief, for appellees Richardson and Sturges.

Mr. Walter W. Ross for appellees Truesdale, Chambers and Post.

Mr. J. D. Campbell submitted a brief for appellees Baer and Brown.

Mr. Robert W. de Forest and *Mr. Robert Thorne* submitted a brief for appellee Waterman.

MR. JUSTICE DAY delivered the opinion of the court.

A motion is made to dismiss the appeal upon the ground that no direct appeal lies to this court from the order of the Circuit Court. The act of February 19, 1903, (Comp. Stat. 1901, Sup.

for 1903, p. 365,) to further regulate commerce with foreign nations and among the States, § 3, closing paragraph, enacts, "*Provided*, That the provisions of an act entitled 'An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the act of July second, eighteen hundred and ninety, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three,' shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

The second section of the act of February 11, 1903, (Comp. Stat. of 1901, Sup. for 1903, p. 376,) provides, "That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts [having reference to the anti-trust act of 1890 and the act to regulate commerce mentioned in the preceding section] wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

In support of the motion to dismiss it is argued that the language of the proviso of section 3, above quoted, "shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission," must be read in connection with preceding paragraphs of the section, which provide for bringing actions by direction of the Attorney General in the Circuit Courts of the United States, and do not include proceedings of the character of the present action to compel the production of books and papers and the giving of testimony by witnesses called before the commission.

It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. *Minis v. United States*, 15 Pet. 423; *Austin v. United States*, 155 U. S. 417, 431; *White v. United States*, 191 U. S. 545, 551. It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a

proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.

In *Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 242, the subject was under consideration, and Mr. Justice Brewer, delivering the opinion, while recognizing the restrictive office of a proviso as stated by Mr. Justice Story in *Minis v. United States*, 15 Pet. 423, 445, added: "While this is the general effect of a proviso, yet in practice it is not always so limited. As said in *Georgia Banking Company v. Smith*, 128 U. S. 174, 181: 'The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of the statute, or from some provisions of it, or to qualify the operation of the statute is some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.'"

The provision in the statute under consideration being intended to enlarge rather than limit the application of previous terms should not receive so narrow a construction as to defeat its purpose. It extends the terms of the act of February 11, 1903, to "any case" brought under the direction of the Attorney General in the name of the Interstate Commerce Commission. The second section of the act of February 11, has reference, it is true, to a suit in equity under certain acts wherein the United States is complainant, and the argument is that the extension of the terms of this act in the act of February 19 is only to suits in equity. But for some reason Congress, in the act under consideration, saw fit not to limit the terms of the extension to suits or proceedings provided for in section 3 of the act of February 19, or to suits in equity, but broadly extended the rights and privileges of the act of February 11, to "cases" of the character designated. We cannot assume that this use of the broader term was without purpose. Before the passage of this act this court had held that a petition filed under section twelve of the interstate commerce act against

a witness duly summoned to testify before the commission, to compel him to testify or to produce books, documents and papers relating to the matter in controversy, makes a case or controversy to which the judicial power of the United States extends. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447. The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers. We cannot read these statutes without perceiving the manifest purpose of Congress to facilitate the disposition of cases brought under the direction of the Attorney General to enforce the provision of the anti-trust and interstate commerce statutes. The present proceeding is not merely advisory to the commission, but, as was said in *Interstate Commerce Commission v. Brimson*, *supra*, a judgment rendered will be a final and indisputable basis of action as between the commission and the defendant, and furnish a precedent for similar cases. While it has for its object the obtaining of testimony in aid of proceedings before the commission, it is evident that important questions may be involved touching the power of the commission and the constitutional rights and privileges of citizens. Congress deemed it imperative that such cases, affecting the commerce of the country as well as personal rights, should be promptly determined in a court of last resort.

If the appeal in the first instance was to the Court of Appeals the judgment of that court would not be final under the act of March 3, 1891, and in such case this court would still be required to consider the cases on final appeal. We think it was the purpose of the act to eliminate an appeal to the Circuit Court of Appeals and to permit the litigation to be shortened by a direct appeal to this court.

We pass now to the merits of the controversy. The record in this case is voluminous, and much of the discussion before the commission is printed. We shall endeavor to classify and consider the questions made so as to indicate our holdings with a view to a proper judgment in the case.

It is urged that the complainant before the commission did not show any real interest in the case brought, and that the proceeding should for that reason have been dismissed. It is provided in the act to regulate commerce, sec. 13, that "any person, firm, corporation," etc., complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof may apply to said commis-

sion by petition, etc. And certain procedure is provided for — and (said commission) “may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made,” and the section concludes: “No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.” In face of this mandatory requirement that the complaint shall not be dismissed because of the want of direct damage to the complainant, no alternative is left the commission but to investigate the complaint, if it presents matter within the purview of the act and the powers granted to the commission.

Power is conferred upon the commission, under section 12 of the act as amended March 2, 1889, and February 10, 1891, (3 U. S. Comp. Stat. of 1901, p. 3162,) to inquire into the management of the business of all common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created.

In making the orders which were the basis of the application to the Circuit Court and in the petition filed therein it is set forth that the commission at the time when the witnesses refused to produce the contracts required, was engaged “in the discharge of its duty to execute and enforce the provisions of the act to regulate commerce and in the exercise of its authority to inquire into the business of common carriers subject to the provisions of the act, and to keep itself informed as to the manner and method in which said business is conducted, and to obtain from said common carriers full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created; and your petitioner is of the opinion that said contracts are not only material and relevant to the issues on trial in said proceeding, but that the production thereof as required by it, as aforesaid, is necessary to enable your petitioner to discharge its duty and execute and enforce said provisions of said act to regulate commerce and to inform your petitioner as to the manner and method in which the business of said common carriers is conducted, and to enable your petitioner to obtain the full and complete information necessary to enable your petitioner to perform the duties and carry out the objects for which it was created.”

But in the present case, whatever may be the right of the commission to carry on an investigation under the general powers

conferred in section 12, this proceeding was under the complaint filed, and we will examine the testimony offered with a view to its competency under the allegations made by the complainant. . . .

KNAPP v. LAKE SHORE AND MICHIGAN SOUTHERN
RAILWAY COMPANY.

197 U. S. 536 (1905).

The facts are stated in the opinion.

Mr. Assistant Attorney General McReynolds and Mr. L. A. Shaver, Solicitor for the Interstate Commerce Commission, for plaintiffs in error.

Mr. George C. Greene for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Petition for mandamus filed in the Circuit Court of the United States for the Northern District of Ohio by the Interstate Commerce Commissioners against the Lake Shore and Michigan Southern Railway Company. The railway company moved to dismiss the petition on the ground that the court had no original jurisdiction to issue a writ of mandamus. The motion was granted and the writ dismissed. A certificate was duly made showing that a question of jurisdiction was in issue, and recites that the court acted not only on the motion of the railroad but on its own motion in dismissing the petition for want of jurisdiction.

The petition alleges that the railroad company is a corporation created by the laws of the States of New York, Pennsylvania, Ohio, Michigan, Indiana and Illinois, and has its principal place of business in the State of Ohio, and is a common carrier engaged in interstate commerce, and as such is subject to the provisions of the act of Congress to regulate Commerce.

That under section 20 of said act the Interstate Commerce Commission is authorized to require any common carrier subject to the act to make reports of certain matters and things, and in pursuance thereof the Commission made an order on the third of June, 1903, prescribing the manner and form in which said reports

Cr will issue mandamus
Comp carrier to follow
order ICC
under §20
ICC carrier to execute
own orders

should be made and the contents thereof, and directed each common carrier to file the same on or before the fifteenth. A copy of the order was served on the railroad company, but the company failed and neglected to make out and return a report in full, in that it failed to set forth in the report made and returned by it the data or information called for, namely, "the tonnage, ton-mileage, earnings and receipts per ton per mile on grain, hay, cotton, live stock, dressed meats, anthracite coal, bituminous coal, and lumber carried in carload lots; and that said data or information required by the Commission to be given in said report by respondent is necessary to enable the Commission to perform the duties and carry out the objects for which it was created, in the interest of the public, and that promptness by carriers in furnishing the same on or before the fifteenth day of September of each year, as required by the Commission, is essential for the purpose, among others, of enabling the Commission to make a full and complete annual report to Congress, which, by section 21 of said act to regulate commerce, is required to be transmitted to said body on or before December 1 of each year."

It is also alleged that there is no adequate remedy except that afforded by mandamus.

It is admitted that under the judiciary act of 1789, 1 Stat. 73, and the act of 1875, as construed by this court, a Circuit Court of the United States has no jurisdiction of an original proceeding seeking relief by mandamus. And counsel, not to minimize the admission, quotes the cases in which that has been laid down and the text books which have expressed the doctrine as settled. But, it is suggested, that under the act of 1887, 24 Stat. 552, a different ruling should be made. No change in language is pointed out which would justify such change in ruling, but we are urged to that radical course in view of the modern development of proceedings by mandamus, and the very great importance of the remedy thereby. We are not impressed by the invocation. We are unable to understand how language conferring jurisdiction on a court can take a new meaning from the circumstances suggested. Difference in remedies is conspicuous in our jurisprudence, and some remedies are of that nature that they can be enforced only under exceptional circumstances and under special grants of power. Of this kind is mandamus, and if Congress had intended by the act of 1887 to confer power on the Circuit Courts to issue mandamus in an original proceeding Congress would not have employed the language which had been construed from the founda-

tion of the Government not to give such jurisdiction. We adhere, therefore, to the prior cases.

2. Congress has undoubtedly power to authorize a Circuit Court to issue a mandamus in an original proceeding. *Kendall v. United States*, 12 Pet. 524; *United States v. Schurz*, 102 U. S. 378. But has Congress done so, as contended, by sections 12 and 20 of the Interstate Commerce Act as amended? Under section 12 the Commission is given the authority to inquire into the management of the business of common carriers subject to the act, and have the right to obtain from the carriers full and complete information to enable it to perform its duties. It is also authorized to enforce the provisions of the act. By section 20 the Commission may require annual reports and fix the time and prescribe the manner in which such reports shall be made. And it is made the duty of any district attorney of the United States, to whom the Commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this act. It is hence contended that the power of the Commission to require the report stated in the petition is undoubted, and having power to order the report to be made the Commission has the power to enforce obedience to the order.

But in what way? Manifestly only in such way as the courts have jurisdiction to give. All powers are given in view of that jurisdiction, and the amendments of the Interstate Commerce Act are so framed. Jurisdiction to issue mandamus is conferred by section 6, to enforce the filing or publishing by a common carrier of its schedules or tariffs of rates, fares and charges. And such jurisdiction is also given to the Circuit Courts and District Courts upon the relation of any person or persons, firm or corporation, alleging a violation of any of the provisions of the act which prevents the relator from having interstate traffic moved on terms as favorable as any other shipper. The remedy is expressly made cumulative of the other remedies provided by the act. It is clear, therefore, when Congress intended to give the power to issue mandamus it expressed that intention explicitly. Such power cannot be inferred from the grant of authority to the Commission to enforce the act or from the direction to district attorneys or the Attorney General to institute "all necessary proceedings for the enforcement of the provisions" of the act (section 12). The proceedings meant are, as we have said, those within the jurisdiction of the court. And special remedies are given. For instance, by

section 16 a summary proceeding in equity is authorized, and the form of the ultimate order of the court may be that of a "writ of injunction or other proper process, mandatory or otherwise."

Without attempting now to define the extent of that section, we may say, it seems adequate to enable the Commission to enforce any order it is authorized to make.

Judgment affirmed.

MR. JUSTICE HARLAN dissented.

HENRY E. MEEKER, SURVIVING PARTNER OF THE
FIRM OF MEEKER & COMPANY, PETITIONER, v.
LEHIGH VALLEY RAILROAD COMPANY.

236 U. S.¹ (1915)

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This was an action under § 16 of the Act to Regulate Commerce² to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in §§ 1 and 2 of that act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the District Court, but the Circuit Court of Appeals reversed the judgment, 211 Fed. 785, and a writ of certiorari granted under § 262 of the Judicial Code brings the case here. 234 U. S. 749.

The plaintiff was the surviving member of Meeker & Company, a copartnership, and sued in that capacity. This firm was engaged in the anthracite coal trade in New York City and was accustomed to purchase its coal at collieries in Pennsylvania and to ship it over the defendant's railroad to tidewater at Perth Amboy, New Jersey, and thence by vessel to New York. Two distinct claims were involved. The first covered shipments from November 1, 1900, to August 1, 1901, and was grounded upon a charge that the railroad company had unjustly and injuriously

¹ Decided February 25, 1915. — ED.

² See act February 4, 1887, 24 Stat. 379, c. 104, and amendments of March 2, 1889, 25 Stat. 855, c. 382; February 10, 1891, 26 Stat. 743, c. 128; February 8, 1895, 28 Stat. 643, c. 61; June 29, 1906, 34 Stat. 584, c. 3591; and June 30, 1906, 34 Stat. 838, Joint Resolution No. 47.

discriminated against Meeker & Company by giving (on August 1, 1901) to another and extensive shipper of anthracite between the same points an indirect but substantial rebate upon all shipments during the same period, and that by reason of this rebate the other shipper had obtained a contemporaneous service in all respects like that rendered for Meeker & Company at a less rate than was exacted from the latter. The second covered shipments from August 1, 1901, to July 17, 1907, and was based upon the charge that the established rate paid by Meeker & Company during the period was excessive and unreasonable.

On July 17, 1907, a complaint embodying both claims was presented to the Interstate Commerce Commission under §§ 9 and 13 of the act, and after a full hearing in which the railroad company was an active participant, the Commission made a written report (21 I. C. C. 129) finding that the charge of unjust discrimination was sustained by the evidence, condemning as excessive and unreasonable the rate which was in effect from August 1, 1901, to the date of the report, naming what was deemed a maximum reasonable rate, holding that the claimant was entitled to an award of reparation upon both claims, and directing that further proceedings be had to determine the amount to be awarded. Under § 15 of the act an order was then made requiring the railroad company within a time named to cease giving effect to the prior rate found unreasonable and to establish a new rate not exceeding that found reasonable.

Thereafter a further hearing was had at which additional evidence bearing upon the question of reparation was presented, and, on May 7, 1912, the Commission made a supplemental report, saying (23 I. C. C. 480):

"In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory in violation of section 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

"On basis of our conclusions in the former report, and upon

consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33; with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal, and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

* * * * *

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered of record an order for reparation which, with a slight amendment made June 15, 1912, was as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$11,009.33, with interest thereon, at the rate of 6 per cent. per annum, from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

"It is Further Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the District Court his petition setting forth briefly the causes for which he claimed

damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition and asserting that they were barred by the applicable statute of limitations, that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at \$109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies.

One of these is Rev. Stat., § 1047, which places a limitation of five years upon any "suit or prosecution for a penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such. Here the liability sought to be enforced was not punitive but strictly remedial, as is shown by §§ 8, 9, 14 and 16 of the Act to Regulate Commerce. So § 1047 was not applicable. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397; *O'Sullivan v. Felix*, 233 U. S. 318; *Huntington v. Attrill*, 146 U. S. 657, 666-669; *Brady v. Daly*, 175 U. S. 148.

Next in order is a Pennsylvania statute containing a limitation of six years. 2 Stewart's Purdon's Digest, 13th ed. 2282. It could apply only in the absence of a controlling Federal statute.

Rev. Stat. § 721; *Campbell v. Haverhill*, 155 U. S. 610; *McClaine v. Rankin*, 197 U. S. 154, 158; *O'Sullivan v. Felix*, *supra*. Such a statute was adopted and put in force before any part of either claim fell within the bar of the local limitation. By the Act of June 29, 1906, 34 Stat. 584, 590, c. 3591, Congress amended § 16 of the Act to Regulate Commerce by incorporating therein the following limitations: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court¹ within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this Act may be presented within one year." The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several States and subject them to limitations of its own creation which would operate alike in all the States.

This amendment is the third statute upon which the defendant relies, the contentions advanced thereunder being (a) that it prevented the Commission from considering any claim accrued more than two years prior to the amendment, and (b) that the year granted for filing claims which accrued before the amendment expired June 28, 1907. Either contention, if sound, would defeat all of the first claim in suit and the major part of the second.

The first contention is plainly not tenable. The amendment contained a general provision limiting the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, and also a proviso saying that "claims accrued prior to the passage of this Act may be presented within one year." The proviso was in the nature of a saving clause, and, while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment. The plain import of the words is to the contrary. The Commission has uniformly construed it as permitting all accrued claims, not already barred, to be presented within the

¹ The Judicial Code, § 291, which became effective, January 1, 1912, requires that the words "Circuit Court" be read "District Court."

year named, and we think they reasonably could not have done otherwise.

The other contention turns upon the sense in which the words "the passage of this Act" were used in the proviso. The act contained a concluding section saying "this Act shall take effect and be in force from and after its passage," but, on the day following its approval, its effective date was postponed by a joint resolution for sixty days, that is, from June 29 to August 28, 1906. 34 Stat. 838. If the act be separately considered and the proviso read in connection with the concluding section, we think it is apparent that the words named referred to the time when the act was to speak and operate as a law, and that the year given for filing accrued claims was to be reckoned from that time. In other words, the meaning was the same as if the proviso had said "claims accrued heretofore may be presented within one year hereafter," or "claims accrued before this Act becomes effective may be presented within one year thereafter." It was not an instance where words referring to the date of passage were chosen to distinguish it from the effective date of the act, for the act was to take effect and be in force upon its passage, and therefore there was no occasion for such a distinction. And, coming to the joint resolution, we think it did not affect the sense of the words in the proviso. That was to be determined in the light of the situation in which they were used, and not by what subsequently happened. Not only so, but the purpose of the joint resolution was to cause the act to speak and operate at the end of the sixty days as if that were the time of its passage. In the meantime the act laid no duty upon this or any other claimant and when the sixty days expired it gave a full year for presenting accrued claims, and not a year less sixty days. See *Matter of Howe*, 112 N. Y. 100; *Harding v. People*, 10 Colo. 387, 392; *State v. Bemis*, 45 Neb. 724, 739; *Patrick v. Perryman*, 52 Ill. App. 514, 518; *Schneider v. Hussey*, 2 Ida. 8; *Charless v. Lamberson*, 1 Iowa 435, 443. It is not a question of notice, as in *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 615-616, but of the meaning and operation of the statute.

It follows from these views that the complaint, which was filed with the Commission July 17, 1907, was seasonably presented and that no part of either claim was barred at that time. And, as the action in the District Court was begun within a year after the date of the order for reparation, the defense predicated upon the statute of limitations must fail.

With a single exception, the other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence, a subject concerning which the courts below differed.

The pertinent provisions of the Act to Regulate Commerce are these: Section 14 requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled" be paid within a fixed time; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides: "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

At the trial the plaintiff offered in evidence the reports and orders of the Commission and asked that the facts stated in the findings and orders be taken as *prima facie* true.

An objection was interposed to the admission of the reports upon the ground that they contained various statements which it was claimed were not findings of fact and therefore were not admissible. A colloquy ensued between court and counsel in which counsel for the plaintiff conceded that portion of the reports should be eliminated and suggested that this could be done in the charge to the jury. As a result of the colloquy the reports were received in evidence, the court observing that it would indicate to the jury what portions were to be considered. The reports were not read at the time, but when the evidence was concluded counsel for the plaintiff, as the record recites, "read to the jury what he stated to be material portions" of them. The record does not more definitely identify what was read; nor does it show that complaint was then made that anything was read that should have been omitted, or that the court's attention was drawn to the subject at the time of charging the jury either by a request for a particular instruction thereon or by excepting to the absence of such an instrument. The court's charge apparently proceeded upon the theory that the portions of the reports which had been read to the jury were properly before them. In these circumstances the objection cannot now be considered. If it was not

obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged.

Another objection which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts — a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* truth, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding and the later one affirmatively shows that it was made to supplement and give effect to the original.

But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and

therefore that no effect can be given to the award. What the reports really disclose is that the Commission, "upon consideration of the evidence adduced upon the hearing upon the question of reparation" found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company Meeker & Company were "damaged to the extent of the difference" between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by § 8 of the Act to Regulate Commerce to award "the full amount of damages sustained," and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis. The case of *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to § 8, said (p. 203): "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered." There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.

It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be *prima facie* evidence of the facts therein

stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained. *Pillow v. Roberts*, 13 How. 472, 476; *Marz v. Hanthorn*, 148 U. S. 172, 182; *Turpin v. Lemon*, 187 U. S. 51, 59; Cooley's Constitutional Limitations, 7th ed. 525, as have many other State and Federal enactments establishing other rebuttable presumptions. *Mobile, etc., Railroad Co. v. Turnipseed*, 219 U. S. 35, 42; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reiller v. Harris*, 223 U. S. 437; *Luria v. United States*, 231 U. S. 9, 25. An instructive case upon the subject is *Holmes v. Hunt*, 122 Mass. 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in no wise inconsistent with the constitutional right of trial by jury. And in *Chicago, etc., Railroad Co. v. Jones*, 149 Ill. 361, 382, a like ruling was made in respect of a statutory provision similar to that now before us.

Complaint is made because the court refused to direct a verdict for the defendant, but of this it suffices to say that the ruling was undoubtedly right, because the plaintiff's evidence, including the findings and orders of the Commission, tended to show every fact essential to a recovery upon both claims and there was no opposing evidence.

The District Court made an allowance of \$20,000 as a fee for the plaintiff's attorneys and directed that it be taxed and collected as part of the costs, the allowance being expressly apportioned in equal amounts between the services in the proceeding before the Commission and the services in the action in court. Complaint is made of this on the grounds (a) that the allowance is in any view excessive, (b) that the act does not authorize an allowance for services before the Commission, and (c) that the provision

authorizing an allowance for services in the action is invalid as being purely arbitrary and as imposing a penalty merely for failing to pay a debt.

Without considering whether the mere amount of an allowance under the statute can ever be re-examined here (see Rev. Stat. § 1011; *Martinton v. Fairbanks*, 112 U. S. 670, 672; *Montague v. Lowry*, 193 U. S. 38, 48; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31; *New York, etc., Railroad Co. v. Winter*, 143 U. S. 60, 75) we are clear that it cannot be in this instance. The record discloses that the allowance was predicated upon an exhibition of a transcript of the proceedings before the Commission and upon a statement made in open court, in the presence of counsel for the defendant, of the services rendered before the Commission and in the action. But the transcript and statement have not been made part of this record and so we cannot know what was shown by them and cannot judge of their bearing upon the amount of the allowance. Besides, it does not appear that the defendant offered any evidence tending to show what would be a reasonable allowance or that it in any way objected or excepted to the amount of the allowance when it was made. The only exception reserved was addressed to the allowance of any fee for the services before the Commission or for those in the action. In this situation the defendant is not now in a position to claim that as matter of fact the allowance is excessive. Whether as matter of law it is objectionable is another question.

Section 8 provides that a carrier violating the act shall be liable to any person injured for the damages he sustains, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." And § 16, relating to actions to enforce claims for damages after the Commission has acted thereon, provides "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit."

In our opinion the services for which an attorney's fee is to be taxed and collected are those incident to the action in which the recovery is had and not those before the Commission. This is not only implied in the words of the two provisions just quoted but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in § 16 which requires the Commission, upon awarding damages, to make an

order directing the carrier to pay the sum awarded "on or before a day named" and then declares that, if the carrier does not comply with the order "within the time limit," the claimant may proceed to collect the damages by suit. The Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment; and, if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when the damages are recovered by suit that a fee is to be allowed, and this is as true of the provision § 8 as of that in § 16. The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit — if the claimant finally prevails — and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. It follows that the District Court erred in matter of law in allowing a fee for services before the Commission.

The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary and as imposing a penalty for merely failing to pay a debt is without merit. The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. *Atlantic Coast Line Railroad Co. v. Riverside Mills*, 219 U. S. 186, 208. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. *Missouri, Kansas & Texas Railway Co. v. Cade*, 233 U. S. 642, 651, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful but certain.

It results from what has been said that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of \$10,000 as an attorney's fee for services before the Commission and affirmed as so modified.



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